

Entered on Docket

August 029, 2010

GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

The following constitutes the
Memorandum Decision of the Court.
Signed July 30, 2010


Roger L. Efremsky
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

AVON TOWNHOMES VENTURE,
Debtor.

Case No. 05-53243-RLE

Chapter 7

**MEMORANDUM DECISION REGARDING
COURT'S ORDER TO SHOW CAUSE**

Before the Court for decision is the Court's Order to Show Cause, which was entered on May 15, 2008, as Docket #222 (the "OSC"). The Court conducted evidentiary hearings on the OSC on July 25, 2008, August 22, 2008, September 10, 2008, September 24, 2008, October 6, 2008, October 15, 2008, October 27, 2008, October 30, 2008 and December 15, 2008. The Court received evidence and heard testimony from James McClehan ("Mr. McClehan"), Raymundo Lujano ("Mr. Lujano"), Joe Guerra ("Mr. Guerra"), Robert Jaramillo ("Mr. Jaramillo"), Samuel Goldstein ("Mr. Goldstein"), Stanley Zlotoff ("Mr. Zlotoff") and Nanette Dumas ("Ms. Dumas"). The Court also reviewed the papers filed by the parties following the conclusion of the December 15, 2008 hearing.

1 The following constitutes the Court's Findings of Fact and Conclusions of Law, pursuant
2 to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

3 **I. INTRODUCTION**

4 This case started out simple; it was a typical single asset bankruptcy case in which
5 Debtor, Avon Townhomes Venture, sought to sell its sole asset - a parcel of partially developed
6 real property in Lathrop, California. A motion to sell was filed, a hearing was held, and the sale
7 was approved. However, the sale and this case became complicated, expensive, and time
8 consuming due to the dishonesty of the participants in the sale and the mismanagement of the
9 case by its professionals.

10 Specifically, when Debtor's principal, Mr. Guerra, filed a declaration in connection with
11 the sale, stating that he had no relationship or connection with the proposed buyer (Metricz), he
12 was not telling the truth. In fact, he was orchestrating every side of the sale, including, but not
13 limited to, controlling Metricz and having his son make \$125,000 in required non-refundable
14 deposits for the purchase. Further, for reasons that are not entirely clear to the Court, Mr. Guerra
15 was able to convince the real estate agent/loan broker (Mr. McClehan), Metricz's alleged
16 principal (Mr. Lujano), and Metricz's alleged president (Mr. Jaramillo) to go along with and
17 advance the fiction that the Property was being purchased by an independent third party. All the
18 while, Debtor's counsel (Mr. Zlotoff), turned a blind eye to the irregularities and inconsistencies,
19 while disregarding specific directives in the Court's order approving the sale.

20 Even when the trustee, Mohamed Poonja, was appointed and began investigating the
21 transaction, the parties held firm to the fictions they had created regarding the sale. Metricz
22 hired Mr. Goldstein, who, because he had a prior relationship with Mr. Guerra and was because
23 he was representing Mr. Guerra in unrelated matters at the time, also seemed intent on
24 perpetuating the fiction that Metricz had purchased the Property and that Mr. Guerra had no
25 connection with the sale or with Metricz. This led directly to the trustee's and his counsel's
26 expenditure of hours upon hours of time and expense, in an attempt to figure out what really
27 happened. Ultimately, the trustee was left with no choice but to bring the matter to the Court,
28

which issued the OSC and conducted nine days of evidentiary hearings in an attempt to find out the truth.

At any point, Mr. Guerra, Mr. Lujano, Mr. McClenehan and/or Mr. Jaramillo could have come clean, and admitted their respective roles in perpetuating the fiction of an arms-length sale. Mr. Goldstein could have admitted that Mr. Guerra was involved with Metricz and that he treated Mr. Guerra as an agent of Metricz. Mr. Zlotoff could have admitted that his lack of oversight contributed to the problem. There was little risk in any of the parties taking these actions, given that the sale ultimately appeared to have been for a price that was higher than the Property's actual value and the estate had apparently not yet been harmed. The OSC would likely have been dissolved. Instead, Mr. Guerra, Mr. Lujano, Mr. McClenehan, Mr. Jaramillo and Mr. Goldstein steadfastly refused to tell the truth and Mr. Zlotoff refused to take responsibility for his failure to monitor the case. The end result was a web of incredible and inconsistent tales, which wasted the trustee's and the Court's time and resources, all the while exponentially increasing the cost to the estate.

Unfortunately for the parties, the Court did not buy their tales. And while the Court recognizes that it may still not know exactly what happened and why, nine days of evidentiary hearings have convinced the Court that Mr. Guerra, Mr. Lujano, Mr. Jaramillo and, most likely, Mr. Goldstein acted in bad faith, lied under oath, and committed fraud on the Court. As a result, sanctions are appropriate and will be levied as specifically identified below.¹ Further, the Court has tentatively determined that Mr. McClenehan's company, Eagle Home Loans,² received an

¹The parties are fortunate that the sanctions are not greater. As noted below, the only reason that the Property ultimately sold for \$610,000 is because there was a fight over Debtor between its two ostensible shareholders, Mr. Guerra and Mr. Aguilar, and Mr. Aguilar brought a competing bidder to the sale. Without a competing buyer, the Property would have sold for the \$400,000 originally offered by Metricz and the estate would have been harmed in the amount of \$210,000 (i.e., the amount the Property could have sold for minus the actual sale price), or in whatever amount the Court ultimately determined was a fair price for the Property. Thus, it is by pure luck that the parties are not faced with substantially larger sanctions.

²Mr. McClehan testified that he is the president, CEO and 100% shareholder of Eagle Home Loans, Inc. See 7/25/08 Transcript, Docket #269, at 24:18-25:1; 10/6/08 Transcript, Docket #289, at 77:3-24. Thus, for purposes of this Memorandum, the terms "Mr. McClehan" and "Eagle Home Loans" are used interchangeably.

1 \$18,300 commission as Debtor's real estate agent, to which it was not entitled and which must
2 be disgorged. Finally, a sanction in the form of disgorgement of the entire amount of fees that
3 were paid to Mr. Zlotoff during the course of this case shall be levied against Mr. Zlotoff for his
4 failure to comply with the specific terms of the Court's sale order and his failure to properly
5 administer this case as Avon's counsel.

6 **I. PROCEDURAL BACKGROUND**

7 **A. Events Leading to the Bankruptcy**

8 1. In January 2001, Luis Aguilar ("Mr. Aguilar") and his wife purchased property
9 located at 14416 and 14429 Avon Avenue, Lathrop, California (the "Property"), with the
10 intention of developing it into twelve townhomes. See Declaration of Mohamed Poonja in
11 Support of Motion to Approve Compromise of Controversy, Docket #136, at ¶ 2. At some point,
12 after determining that he needed a partner to assist him in the development project, Mr. Aguilar
13 answered an advertisement placed in the newspaper by Mr. Guerra. Id. The advertisement
14 represented that Mr. Guerra had experience in joint real estate development projects. Id.

15 2. In early January 2002, Mr. Aguilar and Mr. Guerra entered into a Development
16 Agreement, whereby they agreed that the Property would be transferred to, and developed by, a
17 newly-formed entity, Avon Townhomes Venture ("Debtor" or "Avon").³ Pursuant to the
18 Agreement, Mr. Aguilar agreed to transfer the Property to Avon and to continue making the
19 mortgage payments. Id. at ¶ 4.

20 3. Along with the Development Agreement, Mr. Guerra and Mr. Aguilar prepared
21 and executed Bylaws, which vested sole management control of Avon in Mr. Guerra, and
22 subordinated Mr. Aguilar's stock to that held by Mr. Guerra. Id. Pursuant to the Bylaws, Mr.
23 Aguilar's stock was subject to forfeiture if the mortgage payments fell more than two months
24 behind. Id.

25
26 ³Mr. Aguilar and Mr. Guerra had entered into a previous Development Agreement in November
27 2001. For reasons unknown, that agreement was never performed and was replaced by the January 2002
28 Development Agreement. See Declaration of Mohamed Poonja in Support of Motion to Approve
 Compromise of Controversy, Docket #136, at ¶¶ 3-4.

1 4. Avon's Articles of Incorporation were filed with the California Secretary of State
2 on February 28, 2002. Id.

3 5. Mr. Aguilar transferred the Property to Avon in March 2002. Id.

4 6. Between March of 2002 and April of 2003, it does not appear that Mr. Guerra
5 made any progress in developing the Property. Id. at ¶¶ 6-7.

6 7. On April 2, 2003, Avon borrowed \$120,000 from Fernando Jimenez ("Mr.
7 Jimenez"), in part, to pay the balance due to the City of Lathrop for fees necessary to obtain
8 sewer hookup rights for the development of the Property (the "Jimenez Loan").⁴ Id. at ¶¶ 7-8.
9 Subsequently, the fees were paid and the City of Lathrop granted Avon sewer hookup rights for
10 12 units on the Property (the "Sewer Hookups"). Id. at ¶ 8.

11 8. In July of 2004, Mr. Aguilar, apparently unhappy with Mr. Guerra's lack of
12 progress in developing the Property, purported to terminate the Development Agreement. Id. at
13 ¶ 9. Thereafter, Mr. Aguilar instructed the two tenants of the Property to begin paying rents
14 directly to him, and not to Avon. Id.

15 9. After learning of Mr. Aguilar's demand that the tenants pay rent directly to him,
16 Mr. Guerra purportedly "terminated" Mr. Aguilar's shareholder interest in Avon. Id.

17 10. The Jimenez Loan matured in April 2004, but was not paid. Id. at ¶ 11.
18 Thereafter, Mr. Jimenez recorded a Notice of Default. Id.

19 11. In August 2004, Mr. Aguilar borrowed \$16,000 from his parents and paid the
20 funds to Mr. Jimenez, which caused Mr. Jimenez to rescind the Notice of Default. Id. Several
21 months later, however, Mr. Jimenez recorded a new Notice of Default and scheduled a Trustee's
22 Sale of the Property for May 27, 2005. Id. Mr. Aguilar borrowed an additional \$134,000 from
23 his parents and used the funds to pay Mr. Jimenez in full on May 26, 2005 (i.e., the day before
24 the Trustee Sale). Id.

25 // /

26

27 28 ⁴The Jimenez Loan was secured by the Property. See generally Declaration of Mohamed Poonja
in Support of Motion to Approve Compromise of Controversy, Docket #136, at ¶11.

1 **B. The Bankruptcy Filing**

2 1. On May 26, 2005, Mr. Guerra filed for chapter 11 bankruptcy protection on
3 behalf of Avon.⁵ See Voluntary Petition, Docket #1, at p. 2. The petition was filed *in pro per*.

4 Id.

5 2. The Statement of Financial Affairs indicated that Avon's principals and sole
6 shareholders were Mr. Guerra and Mr. Aguilar.⁶ See SOFA #21, Docket #24, at p. 9. The
7 bankruptcy petition was signed by Mr. Guerra as Avon's President. See Voluntary Petition,
8 Docket #1, at p. 2. Mr. Guerra also acted as Avon's Responsible Individual. See Order
9 Granting Application to Designate Responsible Individual Joe Guerra, Docket #16.

10 3. As of the bankruptcy filing, the only asset owned by Avon was the Property. See
11 Amended Schedule A, Docket # 24, at p. 2.

12 4. On or about July 13, 2005, Mr. Zlotoff substituted in as Avon's counsel. See
13 Notice Regarding Appearance of Attorney for Debtor, Docket #12.

14 **C. The Motion to Sell Property**

15 1. On November 10, 2005, Avon filed a Motion seeking authority to sell the
16 Property to an entity known as Metricz, a California corporation, for the purchase price of
17 \$400,000 (the "Sale Motion"). See First Amended Motion to Sell Free and Clear, Docket #32.

18 2. The Sale Motion represented that "Avon has negotiated a sale of the [Property] to
19 a corporation, Metricz, *unrelated to Avon or to either of its equity owners.*" Id. at 3:5-8
20 (emphasis added).

21 // /

22

23 ⁵The only creditors listed by Mr. Guerra were Mr. Jimenez and The Foreclosure Company, Inc.
24 See List of Creditors, Docket #1, at p. 7. Thus, it appears that Mr. Guerra was not aware that Mr.
25 Aguilar had paid Mr. Jimenez in full, and Mr. Guerra filed the bankruptcy in an attempt to halt the
26 foreclosure sale, which he believed was set for the next day. This was likely the result of the fact that
Mr. Guerra and Mr. Aguilar appear to have had a falling out and stopped communicating after Mr.
Guerra "terminated" Mr. Aguilar's interest in Avon. See Declaration of Mohamed Poonja in Support
of Motion to Approve Compromise of Controversy, Docket #136, at ¶ 9.

27 ⁶Despite this, Mr. Aguilar claims that he was not consulted, nor was he involved in the decision
28 to file bankruptcy. See generally Transcript of 12/7/05 Sale Hearing, Docket #191, at 22:6-26:22.

1 3. The Sale Motion was supported by a declaration from Mr. Guerra, which stated,
2 in pertinent part, “The [P]roperty was listed for sale by a broker who very quickly obtained a
3 buyer based upon his personal contacts. *Neither I nor Luis Aguilar, nor the [D]ebtor, have any*
4 *relationship or connection with the proposed buyer.*” See Declaration of Joe Guerra in Support
5 of Motion to Sell Free and Clear, Docket #30, at 2:16-19 (emphasis added).

6 4. On November 23, 2005, Mr. Aguilar filed an Objection to the Sale Motion. The
7 basis for the Objection was that Mr. Aguilar had found a buyer, Tom Sayles (“Mr. Sayles”), who
8 was willing to purchase the Property for \$550,000. See Objection to Debtor’s Motion to Sell
9 Free and Clear, Docket #35.

10 5. A hearing on the Sale Motion and the competing bids was held on December 7,
11 2005 (the “Sale Hearing”). See Transcript of 12/7/05 Sale Hearing, Docket #191. Mr. Guerra
12 and Mr. Zlotoff appeared on behalf of Avon. Mr. Jaramillo appeared on behalf of Metricz, as its
13 President. Mr. Sayles and his attorney, Jung Park, appeared on behalf of Mr. Sayles. Ms.
14 Dumas appeared on behalf of the United States Trustee. Other appearances were noted in the
15 record.

16 6. At the Sale Hearing, there was substantial discussion between the parties and the
17 Court regarding the disinterestedness of Metricz and Mr. Sayles, and regarding the ownership
18 dispute between Mr. Guerra and Mr. Aguilar. In response, the Court expressed its inclination to
19 continue the Sale Hearing, stating,

20 [W]e have a [Debtor] with some governance issues. . . . [W]e have some
21 questions about who the buyers are. Exactly who the buyers are and are they truly
disinterested third parties? . . .

22 [I]f there are any connections between anybody, then that becomes a concern.

23 . . . I was sitting here thinking about what I want to do about this. And one of the
things that’s running through my mind is to continue this. . . .

24 [F]rom my perspective the absolutely [sic] most important thing is that a sale is
done fairly; it’s legitimate; everybody has a fair shot at buying; that there’s no
shenanigans; there’s no inside deals; there’s no undisclosed relationships; there’s none of
this stuff.

25 . . .
26 [T]here’s an integrity of the process that to me is the most important. And I’d rather lose
a sale than have one – one tainted by some wrongdoings.

27 See Transcript of 12/7/05 Sale Hearing, Docket #191, at 27:20-28:17.

1 7. Following a lengthy recess, the parties decided to go forward with the auction and
2 sale and Avon chose the Metricz offer over the Sayles offer. Regarding the disinterestedness of
3 the parties, Ms. Dumas stated for the record,

4 Your Honor, I spoke to Mr. Guerra, who is the responsible individual of the
5 [D]ebtor. And I questioned him again about any connections that he might have with this
6 buyer. He said he has no connections with Mr. Jaramillo, the president of Metricz
7 Corporation.

8 Mr. Jaramillo similarly says he has no prior connections with Mr. Guerra. Mr.
9 Guerra told me he has no connections with Carlos Hernandez, who is. . . one of the
10 shareholders of Metricz[.]

11 And Mr. Guerra told me he has no connections [sic] Raymundo Lujano, who is
12 the individual who will be . . . the guarantor. . . .

13 In any event, Mr. Guerra says . . . he doesn't know any of these people, he's never
14 met them, he's never seen them. He has no prior connection.

15 I said, "So how did you and this group of parties come together then?" He said
16 that he deals with Eagle Loan, which is a local loan broker. He's had frequent dealings
17 with that company. He told people at the company that he had a piece of property that he
18 needed to sell and that if they knew anybody interested in buying, to let him know.

19 They did that, and that's how he and . . . Metricz . . . came to be involved in this
20 proceeding. This is what he told me. I have no evidence to the contrary.

21 Similarly, I've no evidence to believe that there is any prior connection between
22 Mr. Sayles and Mr. Aguilar. . . .

23 See Transcript of 12/7/05 Sale Hearing, Docket #191, at 43:19-44:24. Neither Mr. Guerra nor
24 Mr. Jaramillo corrected or disputed Ms. Dumas's recitation of the conversations, and neither
25 party responded when Judge Grube asked if anyone had any comments. Id. at 45:10-22.

26 8. Subsequently, the Court approved the sale to Metricz for the sum of \$610,000,
27 subject to specific conditions set forth on the record.

28 9. Among the conditions articulated by the Court was the requirement that Metricz
tender two non-refundable deposits. The first non-refundable deposit of \$25,000 was ordered to
be paid in certified funds on December 8, 2005, one day after the auction and Sale Hearing. See
Transcript of 12/7/05 Sale Hearing, Docket #191, at 49:14-19. The second non-refundable
deposit of \$100,000 was to be paid in certified funds on January 9, 2006. Id. at 49:20-50:7. The
certified funds for these deposits were to be held by Mr. Zlotoff in his trust account, pending
further order of the Court authorizing transfer of the funds to the title company to close escrow.
Id. at 48:24-50:9. If either deposit was not made timely, Mr. Zlotoff was required to declare a
default and notify opposing counsel and Ms. Dumas. Id. at 56:12-14 (emphasis added). If a

1 default were declared, the Court gave Debtor the option of proceeding with Mr. Sayles'
2 \$550,000 back-up offer, or returning to the Court for further proceedings. Id. at 56:15-23.

3 10. Mr. Zlotoff drafted an order memorializing the terms of the sale and the order was
4 entered on December 30, 2005 (the "Sale Order"). See Order Authorizing Sale Free and Clear of
5 Interests, Docket #41.⁷

6 11. The sale of the Property closed on February 3, 2006. See Declaration of
7 Mohamed Poonja in Support of Motion to Approve Compromise of Controversy, Docket #136,
8 at 7:7.

9 **D. Metricz Litigation**

10 1. On June 7, 2006, Metricz filed an adversary proceeding against Avon, Mr.
11 Aguilar, the City of Lathrop and Fernando Jimenez (Adversary Proceeding No. 06-5127) (the
12 "Adversary Proceeding"). The crux of Metricz's claim was that it was induced to purchase the
13 Property at the Sale Hearing by Avon's alleged representation that the Property had been granted
14 the Sewer Hookups, when, in fact, those Sewer Hookups had been terminated by one or all of the
15 Defendants prior to the sale. Metricz alleged that it was damaged in the amount of \$865,000,
16 when it could not resell the Property at a significant profit due to the loss of the Sewer Hookups.⁸
17 See Complaint in Case No. 06-5127, Docket #1.

18 // /

19 7The terms of the Sale Order differed slightly from the conditions articulated by the Court on the
20 record. First, unlike the conditions stated on the record at the hearing, the Sale Order did not require
21 Mr. Zlotoff to hold the certified funds in his trust account pending further order of the Court authorizing
22 transfer of the funds to the title company to close escrow. See Order Authorizing Sale Free and Clear
23 of Interests, Docket #41, at 2:9-3:7. Second, contrary to the conditions articulated at the Sale Hearing
24 that required Mr. Zlotoff to declare a default if the deposits were not made timely, the Sale Order
provided only that Avon **may** declare a default if the deposits were not made as specified. Id. at 2:19-
25 23. Given that the Sale Order did not accurately reflect the Court's rulings, the Court erred in entering
26 the Sale Order in its final form.

27 8The \$865,000 in damages sought reflected the difference between the \$610,000 purchase price
28 that Metricz paid for the Property, and the \$1.475 million purchase offer that Metricz allegedly obtained,
but that fell through when the "proposed buyer" found out that the Sewer Hookups had been terminated.
See Metricz's Case Management Conference Statement in Case No. 06-5127, Docket # 58, at 3:1-3.
The "proposed buyer" was none other than Mr. McClenehhan. See Metricz's Mediation Statement,
attached as Exhibit Q to the Chapter 11 Trustee's Report of Investigation in Case No. 05-53243, Docket
184.

1 2. In return, Avon filed a counterclaim against Mr. Jimenez, Mr. Aguilar and the
2 City of Lathrop, seeking indemnity, a finding of a willful violation of the automatic stay,
3 declaratory relief and turnover of proceeds paid by the City of Lathrop to Mr. Jimenez. See
4 Answer and Cross Claim in Case No. 06-5127, Docket #8.

5 3. The City of Lathrop also filed a Cross-Claim against Debtor, Mr. Jimenez and
6 Mr. Aguilar, seeking indemnity and declaratory relief. See Answer to Cross Claim and Cross
7 Claim in Case No. 06-5127, Docket #16.

8 **E. Trustee Appointment**

9 1. Following commencement of the Adversary Proceeding, the UST and the chapter
10 trustee in Mr. Aguilar's bankruptcy proceeding (the "Aguilar Trustee")⁹ raised questions
11 regarding potential connections between Metricz and Mr. Guerra. In response, both the UST and
12 the Aguilar Trustee filed motions to convert Avon's bankruptcy case to chapter 7. See Motion
13 by United States Trustee to Convert Chapter 11 Case to Chapter 7, Docket # 39 and Motion to
14 Convert Case From Chapter 11 to Chapter 7; Alternative Motion for Authority to Prosecute
15 Causes of Action, Docket #94. After a joint hearing on the motions, in lieu of conversion, the
16 Court ordered the appointment of a chapter 11 trustee so that an independent third party could
17 investigate, among other things, whether there had been an undisclosed relationship between Mr.
18 Guerra and Metricz. See Transcript of Chapter [7] Trustee's Motion to Convert and U.S.
19 Trustee's Motion to Convert, Docket #127, at 27:20 - 33:5.

20 2. On May 11, 2007, Mohamed Poonja was appointed chapter 11 trustee (the
21 "Trustee"). See Order Granting Motion to Appoint Trustee, Docket # 114.

22 **F. Settlement of the Adversary Proceeding and Other Pending Disputes**

23 1. After the Trustee's appointment, the Trustee, Metricz, Mr. Guerra, the Aguilar
24 Trustee, and various other parties participated in a mediation conducted by the Honorable
25 Thomas E. Carlson (the "Mediation"). See generally Motion to Approve Compromise of

26
27 ⁹Mr. Aguilar and his wife filed a chapter 13 bankruptcy case on October 2, 2005. The case was
28 subsequently converted to chapter 7 on January 24, 2007. See In re Luis and Elizabeth Aguilar, Case
No. 05-56609-ASW.

Controversy, Docket #135. As a result of the Mediation, the parties entered into a global settlement (the “Settlement”), wherein, among other things, the parties granted general releases of all claims, except that the Trustee’s releases did not apply to any claims of fraud, collusion or other misconduct related to the sale of the Property. Id. at 9:13-10:22. In addition, the Trustee agreed to assign any and all rights of action it held against Mr. Jimenez, to Metricz.¹⁰ Id. at 9:20-21.

2. An Order Approving the Settlement was entered on September 13, 2009. See Order Granting Application to Compromise Controversy, Docket # 148.

G. Trustee’s Report of Investigation

1. Following his appointment, the Trustee conducted an extensive investigation, including taking the Rule 2004 examinations of Mr. Guerra, Mr. Jaramillo, Mr. Lujano and Mr. McCleuhan.

2. On January 24, 2008, the Trustee filed his Chapter 11 Trustee’s Report of Investigation (the “Report”). See Chapter 11 Trustee’s Report of Investigation, Docket #184. In the Report, the Trustee concluded that: (1) Mr. Guerra had a relationship with Metricz that preceded the Sale of the Property; (2) Mr. Guerra and Mr. Jaramillo had a material relationship; (3) Metricz may have been concealing who directed the Sale; (4) Mr. Guerra likely played a role in the formation of Metricz; (5) Mr. Guerra attempted to “steer” the Property to Metricz; (6) it is likely that Metricz fabricated allegations and documents to support its claims in the Adversary Proceeding; (7) Mr. Guerra committed perjury at his 2004 examination; (8) Mr. McCleuhan’s commission was paid without adequate disclosure; (9) Mr. Zlotoff failed to discharge his obligations as counsel to Avon; and (10) Mr. Guerra failed to claim income earned from Avon on his federal tax returns. Id.

3. Subsequently, the Trustee filed a Motion requesting that the Court issue an Order to Show Cause to various parties to address the allegations made by the Trustee in the Report.

¹⁰Thereafter, in part as a result of the Settlement and in part as a result of other events, the only parties remaining in the Adversary Proceeding were Metricz and Mr. Jimenez.

1 See Motion for Order to Show Cause, Docket # 201.

2 4. At the hearing on the Trustee's Motion, the Court determined that the Trustee had
3 raised issues of sufficient concern to justify the issuance of an Order to Show Cause.

4 **H. The Order to Show Cause**

5 1. On May 15, 2008, the Court issued the current OSC. See Order to Appear and
6 Show Cause, Docket #222. The OSC specifically stated that the Court was considering whether
7 Mr. Guerra, Metricz, Mr. Jaramillo, Mr. McClenehan and/or Mr. Lujano should be sanctioned
8 pursuant to 11 U.S.C. § 105 in light of the allegations that they committed fraud upon the Court
9 by actively concealing and misrepresenting an insider connection between Metricz and Avon.

10 Id.¹¹

11 2. On October 7, 2008, after hearing the testimony of various parties, the Court
12 amended the OSC to include Mr. Zlotoff as counsel for Debtor, and Mr. Guerra as Avon's
13 President and Responsible Individual. See Amended Order to Appear and Show Cause, Docket
14 #281. The Amended OSC specifically stated that the Court was considering whether Mr. Zlotoff
15 and/or Mr. Guerra should be sanctioned pursuant to 11 U.S.C. § 105 for their failure to properly
16 discharge their duties as fiduciaries to the Avon bankruptcy estate (the "Bankruptcy Estate")
17 and its creditors. Id.

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19 ////

20 ////

21 ////

22 ¹¹Contemporaneous with the issuance of the OSC, the Court also issued an Order to Show Cause
23 in the Adversary Proceeding (the "APOS"). See Order to Appear and Show Cause in Case No. 06-
24 5127, Docket #67. The APOS specifically stated that the Court was considering whether Metricz, Mr.
25 Jaramillo, Mr. McClenehan and/or Mr. Lujano should be sanctioned in light of the allegations that they
26 committed fraud upon the Court by manufacturing claims and documentation to support the damages
27 sought in the Adversary Proceeding, and whether Mr. Goldstein should be sanctioned for failing to
28 appropriately discharge his duties as an officer of the Court and as counsel for Metricz by filing and
continuing to prosecute the damages cause of action after its legitimacy was called into doubt. Id. The
APOS is separate and distinct from the proceedings on the OSC. As a result, this Memorandum
Decision does not deal with the Adversary Proceeding or any of the allegations in the APOS. The
APOS is still pending as of the date of this Memorandum.

1 **II. FACTUAL BACKGROUND**

2 The following factual background was distilled from the testimony of the various parties
3 at the OSC.¹²

4 **A. Steps Taken by Mr. Guerra as Avon's Responsible Individual to Market and
5 Sell the Property**

6 When Avon decided to sell the Property, Mr. Guerra contacted Mr. McClehan at Eagle
7 Home Loans.¹³ See Deposition of Joe Guerra, dated July 19, 2007, at 81:16-17. Mr. Guerra
8 testified that he had previously done business with Mr. McClehan and decided to hire him to
9 act as Avon's broker because Mr. McClehan "shared with [Mr. Guerra] that he runs ads in the
10 paper from time to time." Id. at 81:13-17; 89:12-19. Mr. Guerra claimed that he and Eagle
11 Home Loans never filled out a listing agreement employing Mr. McClehan as Avon's broker
12 because Mr. McClehan immediately offered that he had a buyer.¹⁴ Id. at 81:13-17; 84:8-21 .

13 Mr. Guerra also testified that while he wanted top value for the Property, he did not get
14 the Property ready for sale and did not personally take any steps to ensure that the Property was
15 marketed or shown. Id. at 85:6-86:2; 88:4-89:8. Mr. Guerra explained that he believed that the
16 marketing of the Property was Mr. McClehan's responsibility because Mr. McClehan was
17 Avon's broker and would be receiving a commission from any sale. Id. Mr. Guerra testified that

18 ¹²The Court recognizes that the testimony of the witnesses is inconsistent and that the various
19 stories, at best, do not hold together well and, at worst, are patently ridiculous. This is the result of the
20 failure of various key players to testify truthfully, or their refusal to testify at all. Despite these
21 limitations, the Court has attempted to cobble together a coherent story from all of the divergent tales,
22 while identifying where those tales diverge.

23 ¹³Mr. Guerra invoked the Fifth Amendment in response to many of the questions he was asked
24 at the OSC hearings. In response, the Trustee's counsel, Mr. Tate, read portions of Mr. Guerra's 2004
25 Examination testimony into the record. Mr. McClehan's counsel, Mr. Roberts, objected on hearsay
26 grounds. The Court finds that by invoking the Fifth Amendment and refusing to answer questions, Mr.
27 Guerra made himself unavailable as a witness. See Federal Rule of Evidence 804(a)(1) and (2). As a
28 result, Mr. Guerra's Rule 2004 Examination testimony constitutes an exception to the hearsay rule and
29 is admissible. See Federal Rule of Evidence 804(b). Thus, Mr. Roberts' objection is overruled.

30 ¹⁴Mr. Guerra originally claimed that it was during their first conversation regarding the Property
31 that Mr. McClehan offered that he had a buyer. See Deposition of Joe Guerra, dated July 19, 2007,
32 at 84:10-21. Later, he backtracked and said that Mr. McClehan found a buyer "relatively quick [sic]." Id.
33 at 90:7-91:7. Mr. Guerra's testimony on this point appears to be a complete fabrication in an attempt
34 to conceal the fact that before contacting Mr. McClehan, Mr. Guerra already knew that Metricz would
35 be the buyer.

1 while he “understood” that Mr. McClehan would market and show the Property to potential
2 purchasers, Mr. Guerra did not have any actual knowledge of any marketing efforts because he
3 never asked or followed up with Mr. McClehan. Id. at 87:3-88:25.

4 Mr. Guerra further testified that he only had a few conversations with Mr. McClehan
5 regarding the Property, and that the only conversation he had with Mr. McClehan after
6 authorizing Mr. McClehan to sell property was to ask if escrow had closed.¹⁵ Id. at 82:8-11;
7 96:2-12. Mr. Guerra testified that he had not heard of Metricz before the Sale Hearing and did
8 not learn that Metricz was the proposed buyer until the Sale Hearing.¹⁶ Id. at 91:18-93:24.

9 **B. The Sale**

10 Mr. McClehan testified that Mr. Guerra approached him to see if he could find
11 somebody interested in buying the Property. Mr. Guerra allegedly provided only a rough idea of
12 the details of the Property and allegedly did not provide a price range for the sale. See 7/25/08
13 Transcript, Docket #269, at 26:15-25; 27:1-11; 34:1-17. Mr. McClehan testified that he did
14 not list the property for sale, but simply mentioned the Property to people he came across in his
15 daily activities, including Mr. Hernandez, who allegedly referred Mr. Lujano to Mr.
16 McClehan.¹⁷ See 7/25/08 Transcript, Docket #269, at 27:17-28:7; 9/24/08 Transcript, Docket

17 ¹⁵Mr. Guerra justified this lack of contact with Mr. McClehan by explaining, “[W]hen I . . .
18 hire subcontractors, I hire competent people. So why would I involve myself - - that would be an
19 insult.” See Deposition of Joe Guerra, dated July 19, 2007, at 98:2-8. This testimony is completely
20 unbelievable. If Mr. Guerra was not talking with Mr. McClehan, then who was negotiating the sale
21 on behalf of Avon? Mr. Zlotoff testified that it was Mr. Guerra who brought the completed contract to
22 Mr. Zlotoff. See 10/27/08 Transcript, Docket #292, at 8:9-21. Mr. Zlotoff also testified that he never
23 spoke to Mr. McClehan prior to, or during the sale transaction. Id. The only possible scenarios are
24 that Mr. Guerra was lying about his role in procuring the sale to Metricz or that Mr. Guerra completely
25 abdicated his fiduciary duties to Avon as its responsible individual in failing to monitor professionals
26 acting on Avon’s behalf. Neither scenario is favorable to Mr. Guerra.

27 ¹⁶This testimony also appears to be a lie. Mr. Guerra signed a declaration in support of the Sale
28 Motion which stated that he had no connection with Metricz. Thus, as of the date of the Sale Motion
in 2005, he had to have known of Metricz. If he did not know, it proves only that he lied in his
declaration in support of the Sale Motion.

29 ¹⁷Mr. Lujano testified that it was actually a “Mr. de la Torre” who introduced him to Mr.
30 McClehan. See 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 45:13-15. The Court does
31 not believe that Mr. de la Torre exists and therefore, doubts Mr. Lujano’s recollection regarding how
32 he met Mr. McClehan. See *infra* section 2C (“The Formation of Metricz and the Elusive Mr. de la
33 Torre”).

#287, at 43:10-44:7. Mr. McClehan did not provide Mr. Hernandez or Mr. Lujano with any details regarding the Property. Instead, he provided both of them with the address and simply told them to go see the Property for themselves.¹⁸ See 7/25/08 Transcript, Docket #269, at 28:10-23; 9/24/08 Transcript, Docket #287, at 44:1-10. A couple of weeks later, Mr. Lujano spoke with Mr. McClehan again and expressed his interest in purchasing the Property. See 7/25/08 Transcript, Docket #269, at 29:1-4. Mr. McClehan believes he drew up the initial purchase offer for Mr. Lujano, but Mr. McClehan did not recall what the price was, or to whom it was presented. Id. at 35:1-23.

Mr. Zlotoff testified that Mr. Guerra came to him with a contract of sale that indicated that Metricz was the buyer. Mr. Zlotoff did not recall having a conversation with Mr. Guerra regarding how Metricz found out about the Property or became interested in purchasing the Property. See 10/27/08 Transcript, Docket #292, at 8:9-21. Mr. Zlotoff did not talk to Mr. McClehan prior to filing the Motion to Approve the Sale and he did not recall speaking with Mr. McClehan during the transaction. Id. at 9:6-8; 10:8-9.

C. The Formation of Metricz and the Elusive Mr. de la Torre

Mr. Lujano testified that he assists people with drug and alcohol problems, explaining, “I rescue the people, I rehabilitate them, I get them into a program, and they work, and . . . then I let them out into the community to redo their lives.” See 8/22/08 Transcript, Docket #270, at 90:25-91:6; 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 30:2-15. He claimed that these people originally lived with him at his home in San Jose, but that his house got too small. See 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 29:21-30:7. Thereafter, he decided that he wanted to purchase a property outside of San Jose to create an alcohol and drug rehabilitation facility to house these individuals. See 8/22/08 Transcript, Docket #270, at 79:23-25; 9/10/08

¹⁸Mr. McClehan testified that he had a five minute telephone conversation with Mr. Lujano regarding the Property. See 7/25/08 Transcript, Docket #269, at 28:10-29:4. The Court does not find this testimony to be credible. Mr. McClehan doesn’t speak Spanish. See 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 10:2-3. Mr. Lujano testified that he doesn’t speak English well, has only a sixth grade education and required a translator for the OSC hearings. See 8/22/08 Transcript, Docket #270, at 17:7-21. Assuming Mr. Lujano’s English is as limited as he portrayed it, there is no indication that Mr. McClehan would have been able to communicate effectively with Mr. Lujano.

Transcript in Case No. 06-5127, Docket #145, at 29:19-30:7. A Mr. Carlos de la Torre¹⁹ ("Mr. de la Torre") informed Mr. Lujano that a corporation was the best way to purchase property.²⁰ See 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 35:20-36:2; 45:7-9.

Mr. Lujano testified that it was Mr. de la Torre that helped him purchase Metricz.²¹ See 8/22/08 Transcript, Docket #270, at 66:14-16. He also testified that he believed that he had paid Mr. de la Torre approximately \$1,500 for the purchase.²² Id. at 66:19-67:5; 10/15/08 Transcript, Docket #291, at 30:23-31:12. In return, Mr. Lujano claims he was given "a paper that indicated that [he] was the new owner."²³ See 10/15/08 Transcript, Docket #291, at 31:17-18. Mr. Lujano could not remember if he purchased Metricz before or after he applied for loans to

¹⁹It is unclear how or when Mr. Lujano allegedly met Mr. de la Torre. What is clear is that other than Mr. Lujano, no other party to the proceeding knew, or had ever seen Mr. de la Torre. See 10/6/08 Transcript, Docket #289, at 99:6-7 (Mr. Jaramillo does not know Mr. de la Torre); 10/6/08 Transcript, Docket #289, at 74:2-13 (Mr. Goldstein does not know Mr. de la Torre); 10/15/08 Transcript, Docket #291, at 104:11-23 (Mr. Guerra does not admit to knowing Mr. de la Torre, the Trustee was not able to find Mr. de la Torre, and Mr. McClenehan has not seen Mr. de la Torre); 10/27/08 Transcript, Docket #292, at 26:3-7 (Mr. Zlotoff does not know Mr. de la Torre). Mr. Lujano never provided any evidence or credible testimony to convince the Court of Mr. de la Torre's existence. The Court presumes that if Mr. de la Torre had participated in the purchase of the Property as extensively as Mr. Lujano claims he did, some other party to the sale would have seen, spoken to, or interacted with him. No one did. Thus, the Court has concluded that Mr. Lujano made Mr. de la Torre up and no such person exists. The Court has also concluded that the only reason for making up Mr. de la Torre, was so that Mr. Lujano could have an excuse for not knowing anything about his purchase of Metricz, his purchase of the Property, and all of the events surrounding the two.

²⁰Mr. Lujano testified that he did not know how a corporation works, and that he only purchased Metricz because of Mr. de la Torre's representations. See 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 35:20-36:2.

²¹It is unclear who owned Metricz prior to Mr. Lujano's purchase of the corporation. At one point, Mr. Lujano testified that Mr. de la Torre was the individual that created Metricz. See 8/22/08 Transcript, Docket #270, at 66:14-24. Mr. Lujano later testified that he did not know who had formed Metricz, but that he had purchased it from Mr. de la Torre. See 10/15/08 Transcript, Docket #291, at 30:22-24. It is also unclear what Mr. Lujano thought he was buying when he "purchased" Metricz.

²²Mr. Lujano claims that he never obtained a receipt for the payment because he "trusted" Mr. de la Torre. See 8/22/08 Transcript, Docket #270, at 67:6-7; 10/15/08 Transcript, Docket #291, at 31:13-18.

²³Mr. Lujano described the paper as a single page. He could not remember what it said or what he did with it, but claimed it was a guaranty that he was the new owner. See 10/15/08 Transcript, Docket #291, at 31:17-32:18. Mr. Lujano also could not remember if he ever received any other paperwork from Mr. de la Torre relating to Metricz. Id. at 32:6-9.

1 purchase the Property.²⁴ See 9/24/08 Transcript, Docket #287, at 11:2-11.

2 Mr. Lujano claimed that he raised approximately \$150,000 through cash donations
3 collected at Christ the King Church on Monterey Road in San Jose, for the purpose of
4 purchasing Metricz and making the down payments on a property. See 8/22/08 Transcript,
5 Docket #270, at 64:20-25; 67:17-68:3; 93:18-94:2; 9/10/08 Transcript in Case No. 06-5127,
6 Docket #145, at 25:4-10. Mr. Lujano alleges that the funds were “gifts” and, despite having a
7 bank account, the cash was kept at his house because “it was not [his] money.”²⁵ See 8/22/08
8 Transcript, Docket #270, at 64:16-19; 65:9-17; 100:15-25; 112:1-13.

9 Mr. Lujano knew little to nothing about the purchase of the Property and claimed that
10 was the case because Mr. de la Torre assisted him and did everything that needed to be done.
11 Mr. Lujano claimed that he simply asked Mr. de la Torre to “buy something outside of San
12 Jose[.]”²⁶ Id. at 70:1-3.

13 Mr. Lujano testified that he never visited the Property prior to the Sale Hearing, nothing
14 about the Property had been described to him before the Sale Hearing, and he did not learn what
15 property had been purchased until after the Sale Hearing. See 8/22/08 Transcript, Docket #270,
16 at 70:24-71:4; 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 36:10-19; 10/15/08
17 Transcript, Docket #291, at 20:21-22; 21:21-25; 42:12-16. He further testified that even at the
18 time he made the initial \$25,000 deposit to buy the Property, he did not know what was being
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22 ²⁴He later changed his testimony and stated that he had purchased Metricz before he purchased
23 the Property. See 10/15/08 Transcript, Docket #291, at 32:3-5.

24 ²⁵The Court notes that no receipts or proof of the cash were ever provided and no one, other than
25 Mr. Lujano, claims to have seen or utilized cash for any part of the purchase of the Property.

26 ²⁶Subsequently, Mr. Lujano testified that it was Mr. Jaramillo who informed Mr. Lujano about
27 potentially purchasing the Property. See 8/22/08 Transcript, Docket #270, at 71:20-72:2. Mr.
28 McClenehan testified that neither Mr. Jaramillo nor Mr. de la Torre were ever involved in the process.
See 9/24/08 Transcript, Docket #287, at 32:3-20. Mr. Jaramillo denies that he was involved in the sale
of the Property prior to making the bid at the Sale Hearing on December 7, 2005. See 10/6/08
Transcript, Docket #289, at 83:14-84:16; 89:15-90:20.

1 purchased. See 8/22/08 Transcript, Docket #270, at 68:10-13.²⁷

2 At the time that Mr. Lujano purchased Metricz, Mr. Hernandez was on the Board of
3 Directors.²⁸ See 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 33:25-34:3. Later,
4 Mr. Lujano, Mr. Jaramillo, and possibly Mr. de la Torre were added.²⁹ See 9/10/08 Transcript in
5 Case No. 06-5127, Docket #145, at 34:18-35:3.

6 **D. Mr. Jaramillo as President of Metricz**

7 Mr. Jaramillo testified that Mr. Lujano contacted him by phone and asked Mr. Jaramillo
8 to become Metricz's interim president so that Mr. Jaramillo could go to court to bid on the
9 Property. See 10/6/08 Transcript, Docket #289, at 83:19-84:19. Mr. Jaramillo claimed that Mr.
10 Lujano contacted him because Mr. Lujano was not comfortable speaking English and he needed
11 someone to go to court to bid on the Property on Metricz's behalf.³⁰ Id. Mr. Jaramillo testified

12 ²⁷Mr. Lujano's testimony on this point completely contradicts Mr. McCleehan's testimony. Mr.
13 McCleehan testified that he spoke with Mr. Lujano and told Mr. Lujano to go look at the Property prior
14 to making an offer. See 7/25/08 Transcript, Docket #269, at 28:10-23. Mr. McCleehan also claims
15 that Mr. Lujano did look at the Property and then contacted Mr. McCleehan to indicate his interest in
16 purchasing it. Id. at 29:1-4. Given Mr. Lujano's lack of knowledge regarding any of the events that
17 occurred in this case, his testimony that he did not know what property was being purchased and never
18 saw it prior to the sale may be the only true testimony that he proffered in his entire time on the stand.
19 Unfortunately for him, however, it does not help his cause or his credibility.

20 ²⁸Mr. Lujano claims that he has "seen" Mr. Hernandez once or twice, but Mr. Lujano did not
21 discuss Metricz business with Mr. Hernandez because Mr. Hernandez was "not very active." See
22 8/22/08 Transcript, Docket #270, at 84:10-85:18; 9/10/08 Transcript in Case No. 06-5127, Docket #145,
23 at 33:17-24. Mr. Lujano also alleges that Mr. Hernandez either resigned or quit shortly after Mr. Lujano
24 purchased Metricz. See 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 34:4-17. Mr. Lujano
25 testified that Mr. Hernandez and Mr. de la Torre are two different people. See 8/22/08 Transcript,
26 Docket #270, at 85:5-7; 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 33:13-16.

27 ²⁹Mr. Lujano believed that Mr. de la Torre had also been added to the board of directors at some
28 point "because [Mr. de la Torre] got [the corporation] for [Mr. Lujano]." See 9/10/08 Transcript in Case
29 No. 06-5127, Docket #145, at 34:22-25. Currently, Mr. Lujano believes he is the only board member.
He claims there have been no formal resignations, but that the other board members stopped being in
30 touch with him. Id. at 35:1-8. The Court notes that no corporate formalities were ever followed, thus
there does not appear to be any record of the board composition at any time after Mr. Lujano's purchase.
Id. at 35:9-20.

31 ³⁰Mr. Lujano claimed it was either Mr. McCleehan or Mr. de la Torre who introduced him to
32 Mr. Jaramillo and suggested that Mr. Lujano hire Mr. Jaramillo for the auction. See 8/22/08 Transcript,
33 Docket #270, at 72:7-8; 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 33:9-12; 45:10-12;
34 55:17-25. Mr. Jaramillo and Mr. McCleehan both testified, however, that they did not meet until the
35 first day of the Order to Show Cause hearings, thus Mr. McCleehan could not have introduced Mr.
36 Lujano to Mr. Jaramillo. See 9/24/08 Transcript, Docket #287, at 116:15-117:1; 10/6/08 Transcript,

that he was paid one thousand dollars in cash for his services.³¹ Id. at 85:23-24; 86:2-3. Mr. Jaramillo did not have anything in writing specifying his responsibilities and he did not sign any papers putting him in place as the interim president of Metricz. Id. at 85:12-17. Mr. Jaramillo claims that he told Mr. Lujano that he was too busy to do anything for Metricz other than make the bid. Id. at 85:20-86:1; 10/30/08 Transcript, Docket #293, at 57:21-58:5. Mr Jaramillo further claims that nothing was ever said about his tenure lasting past the December 7, 2005 hearing. See 10/30/08 Transcript, Docket #293, at 58:6-59:9.

Prior to making the bid, Mr. Jaramillo claimed that he reviewed Metricz's Articles of Incorporation³² and the California Secretary of State website because he didn't want to go into court and represent that he was the president of a non-viable corporation.³³ See 10/6/08 Transcript, Docket #289, at 100:3-11. He claimed that he was told that Mr. Lujano was the sole shareholder. Id. at 99:12-20. He also claimed that he did not know who the officers or directors were. Id. Mr. Jaramillo testified that he only dealt with Mr. Lujano and did not meet him in person until after the sale, when Mr. Lujano came into Mr. Salciccia's office, seeking legal counsel.³⁴ Id. at 100:20-22; 101:3-14.

Docket #289, at 94:4-13. Further, Mr. Jaramillo testified that he does not know Mr. de la Torre. See 10/6/08 Transcript, Docket #289, at 99:6-7. As a result, Mr. Lujano's testimony appears to be false on this point.

³¹Mr. Jaramillo testified that the money arrived at his restaurant by courier, in an envelope, full of cash, with Mr. Lujano's name and a phone number on the envelope. See 10/6/08 Transcript, Docket #289, at 86:16-87:22. Mr. Lujano, however, testified that he did not know how Mr. Jaramillo was paid (i.e., cash or check), how much he was paid, by whom, or how the funds were delivered. See 10/15/08 Transcript, Docket #291, at 22:21-24:7.

³²It is unclear how Mr. Jaramillo reviewed the Articles of Incorporation or where he got them from, as Mr. Lujano testified that he did not know what they were and did not remember if he had ever seen them. See 10/15/08 Transcript, Docket #291, at 35:2-10.

³³Mr. Jaramillo testified that despite the fact that he reviewed the Secretary of State website to ensure that Metricz was a valid California corporation, he did not see that his employer, Mr. Salciccia, was listed as Metricz's agent for service of process. See 10/6/08 Transcript, Docket #289, at 101:18-102:17; 175:16-178:5. Notably, Mr. Salciccia was also Avon's agent for service of process. Id. at 102:8-17.

³⁴Mr. Lujano confirmed that he had previously hired Salciccia on an unrelated matter, but testified that he only had one in-person meeting with Mr. Jaramillo, which occurred not at Mr. Salciccia's office, but at Mr. Jaramillo's restaurant. See 10/15/08 Transcript, Docket #291, at 22:1-20;

1 Mr. Jaramillo claimed that he hadn't spoken to Mr. Lujano since the sale and that he did
2 not do any further work for Metricz after the sale. See 10/6/08 Transcript, Docket #289, at
3 93:20-94:3; 95:13-15; 96:23-97:1.³⁵

4 **E. Sale Price**

5 Mr. Jaramillo testified that he was told by Mr. Lujano that Mr. Jaramillo had
6 authorization to bid up to \$675,000, although Mr. Lujano did not want to go that high. See
7 10/6/08 Transcript, Docket #289, at 90:4-8. Mr. Lujano, on the other hand, testified that he
8 never made an offer on the Property and never gave Mr. Jaramillo a specific offer amount.
9 Instead, Mr. Lujano claims he just told Mr. Jaramillo "more or less the amount that we could
10 possibly pay."³⁶ See 10/15/08 Transcript, Docket #291, at 20:2-21:1.

11 **F. The Pre-Sale "Qualification Letter"**

12 Mr. Jaramillo testified that at the Sale Hearing, after pressure from Mr. Sayles, the Court
13 requested proof that Metricz had the ability to obtain the necessary financing to purchase the
14 Property. See 10/6/08 Transcript, Docket #289, at 91:1-14. Mr. Jaramillo testified that at a

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16 30:17-18; 54:24-55:4.

17 ³⁵Mr. Jaramillo later amended his testimony to admit that he participated in the Mediation on
18 behalf of Metricz after the sale closed and that he signed a settlement check as Metricz's president in
19 connection with the Mediation. See Section M, below. In addition, various declarations were
20 introduced as exhibits that purportedly contained Mr. Jaramillo's post-sale signature and identified him
21 as the president of Metricz. See generally 10/6/08 Transcript, Docket #289, at pp. 155-167; 192-196.
22 While Mr. Jaramillo denied signing these declarations, he did admit that if Mr. Goldstein had presented
23 him with a declaration, he would have signed it simply because Mr. Goldstein told him to. See 10/6/08
Transcript, Docket #289, at 156:5-157:17. Further, Mr. Goldstein elicited testimony which indicated
24 that Mr. Jaramillo may have, in fact, signed some of the declarations. Id. at pp. 179-182. If these
25 declarations were signed by Mr. Jaramillo, they would have directly contradicted his testimony that he
26 did no further work for Metricz after the December 7, 2005 sale. Unfortunately, the exhibits were never
27 admitted, thus the Court gives them no weight. Regardless, Mr. Jaramillo clearly had a more significant
28 post-sale role in Metricz than he originally wanted the Court to believe.

29 ³⁶In response to the question of whether Mr. Lujano gave Mr. Jaramillo a specific price to offer
30 for the Property at the Sale Hearing, Mr. Lujano testified, "Well, I didn't know exactly which property
31 they were going to buy, but yes, more or less the amount that we could possibly pay. So I think that no
32 less than 400, but no more than maybe 680, something like that, 700, along those lines. As I repeat, I
33 don't remember exactly. It's been a while and I don't remember exactly." See 10/15/08 Transcript,
34 Docket #291, at 20:21-21:1. Possibly more curious than Mr. Lujano not being able to remember how
35 much he offered for the Property, was his consistent use of "we" and "they" to reference a sale that was
36 allegedly only to his corporation, Metricz.

1 break in the hearing, he called Mr. Lujano and requested a document from the lender showing
2 that Metricz had approval for a loan. Id. at 127:3-128:21. Mr. Lujano allegedly told Mr.
3 Jaramillo that Mr. Lujano would have the letter delivered to the Court.³⁷ Id. at 128:14-15.
4 Subsequently, a courier arrived at the courthouse with a letter which indicated that Metricz and
5 Mr. Lujano were approved for financing of up to \$675,000 (the “Pre-Sale Qualification
6 Letter”).³⁸ Id. at 91:15-19; 120:11-20.

7 The Pre-Sale Qualification Letter was on Eagle Home Loans letterhead and was
8 purportedly signed by Mr. McClehan. See 9/24/08 Transcript, Docket #287, at 60:16-61:6.
9 Mr. McClehan testified that while it was Eagle Home Loans’ letterhead and its address, he did
10 not recall speaking to Mr. Lujano about pre-qualification and he did not believe that the
11 signature was his. Id. at 61:1-62:16. However, Mr. McClehan was not adamant that it was not
12 his signature and when pressed, he declined to state affirmatively that he did not prepare the
13 letter on behalf of Eagle Home Loans. Id. at 63:24-64:16.

14 Mr. McClehan also testified that in order to pre-qualify a client, he would solicit
15 information such as income, credit score and loan-to-value ratio. Id. at 63:2-23. He testified,
16 however, that he would have written a pre-qualification letter based on credit score alone if Mr.
17 Lujano had provided him with that information. Id. at 64:2-16.³⁹

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21 ³⁷Mr. Lujano could not remember speaking with Mr. Jaramillo about the Pre-Sale Qualification
22 Letter, whether he was required to produce any paperwork to Mr. Jaramillo on the day of the sale, or
23 whether the letter was prepared at Mr. Lujano’s direction. See 10/15/08 Transcript, Docket #291, at
24 12:19-13:8; 14:25-15:15; 18:7-17. When shown a copy of the Pre-Sale Qualification Letter, Mr. Lujano
25 testified that he thought he had seen the letter before, but he did not remember when, and he did not
26 know who had prepared it. Id. at 14:18-24; 15:18-19.

27 ³⁸The Court queries how Metricz could have been “approved for financing” when Metricz had
28 no credit history and/or credit score.

29 ³⁹Mr. McClehan never actually obtained a credit report on Mr. Lujano until the day after the
30 Sale Hearing. See 9/24/08 Transcript, Docket #287, at 60:2-9. Given, however, that Mr. McClehan
31 testified that he would write a pre-qualification letter with a verbal credit score, this fact is not
32 determinative as to whether Mr. McClehan actually wrote the Pre-Sale Qualification Letter.

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G. The Loan Application

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Following the Sale Hearing, a loan application for the purchase of the Property was prepared (the “Application”) with Mr. Lujano as the buyer.⁴⁰ See Exhibit F. Mr. Lujano testified that he filled out parts of the Application by himself, then went to Mr. McCleuhan’s office for assistance with the rest. See 8/22/08 Transcript, Docket #270, at pp. 103-107; 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 45:18-22. Mr. Lujano also claimed that while he was at the Eagle Home Loans office, Mr. McCleuhan explained the terms of the Application in English because Mr. McCleuhan does not speak Spanish. See 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 10:2-9.⁴¹ Mr. Lujano claimed that he and Mr. McCleuhan were the only people present when the Application was prepared. Id. at 9:16-10:1. Mr. Lujano testified that he prepared and signed the Application and that all of the handwriting on the Application was his. See 8/22/08 Transcript, Docket #270, at 102:5-19; 103:3-5; 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 10:10-23; 22:5-9.

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Despite this testimony, Mr. Lujano knew very little about the details of the Application’s preparation, or about its contents. See generally 8/22/08 Transcript, Docket #270, at pp. 103-111. In addition, the handwritten Application was erroneous in many material respects; none of which Mr. Lujano could explain satisfactorily.

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⁴⁰Although Metricz was the purported purchaser of the Property, Mr. Lujano applied for the loan as an individual. This was allegedly because the bank would only loan to an individual and not to a business. See 7/25/08 Transcript, Docket #269, at 36:16-21; See also, 2004 Examination of Mr. McCleuhan, dated September 17, 2007, at 33:12-20.

⁴¹Mr. McCleuhan claims that the Application was either mailed or dropped off at his office and that he does not remember assisting Mr. Lujano with the Application or meeting with him to go over the entries. See 9/24/08 Transcript, Docket #287, at 26:11-24; 56:3-57:11.

1 Second, also on page one, under Borrower Information, the handwritten entry for Mr.
2 Lujano's address was 265 N. 25th Street, San Jose, California. See Exhibit F. Mr. Lujano
3 testified, however, that he had made a "mistake" and his address was actually on 26th Street. See
4 8/22/08 Transcript, Docket #270, at 104:10-19.⁴²

5 Third, on page two, under the Assets section of the Application, one account at Bank of
6 America was listed. See Exhibit F. Mr. Lujano testified that while he has "several" accounts at
7 Bank of America, he only listed one of the accounts because he "didn't think it was necessary"
8 to list the others. See 8/22/08 Transcript, Docket #270, at 107:1-9.

9 Fourth, and most egregious, on the second page of the Application, also under the Assets
10 section, two accounts at Washington Mutual were listed. See Exhibit F. At least one of the
11 account numbers, however, was a checking account belonging to a "Joe Guerra."⁴³ See 9/24/08
12 Transcript, Docket #287, at 136:5-20. When presented with evidence of this fact, Mr. Lujano
13 testified that he wrote down the number of Joe Guerra's checking account, believing that he was
14 listing the account number of a line of credit Mr. Lujano had taken out.⁴⁴ See 8/22/08 Transcript,
15 Docket #270, at 110:1-111:9. Later, Mr. Lujano admitted that the two Washington Mutual
16 accounts listed on the Application were not his, and in fact, were the account numbers of an
17 "electrician" that was working on Mr. Lujano's house in San Jose. Mr. Lujano testified that this
18 "electrician" was going to help Mr. Lujano qualify for a higher amount of financing. See
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20 ⁴²The Court questions how Mr. Lujano could possibly make a "mistake" on the address of the
21 home he had lived at for twelve years; especially where the entry was handwritten and could not be
blamed on a typo. See Exhibit F.

22 ⁴³Mr. Guerra subsequently testified that the account belonged to his son, Joe Guerra Jr. See,
23 9/24/08 Transcript, Docket #287, at 136:5-137:11. Given Mr. Guerra's consistent lack of candor, the
24 Court is skeptical. Further, there was testimony that this account had been used to pay Mr. Guerra's
bills. Specifically, Mr. Goldstein testified that a check payable to him and drawn on this account, was
for legal services that Mr. Goldstein had performed for Mr. Guerra. See 10/6/08 Transcript, Docket
25 #289, at 60:22-62:4. Regardless of whether this is Mr. Guerra's account or his son's account, this is yet
one more piece of irrefutable evidence of Mr. Guerra's connection with Metricz and the purchase of the
26 Property.

27 ⁴⁴The Court marvels at the fact that Mr. Lujano thought the Court was gullible enough to believe
it was a coincidence that out of all of the account numbers in the world, Mr. Lujano was able to
"mistakenly" come up with an account number that belonged to someone named Joe Guerra.

1 10/15/08 Transcript, Docket #291, at 47:13-22. When questioned further, Mr. Lujano testified
2 that the “electrician” was none other than Mr. Guerra’s son, Joey Guerra, or Joe Guerra, Jr. Id.
3 at 48:2-14.⁴⁵

4 **H. \$25,000 Deposit**

5 Mr. Lujano testified that he gave \$25,000 in cash to Mr. de la Torre, who was to give the
6 funds to Mr. McCleuhan for the first deposit.⁴⁶ See 8/22/08 Transcript, Docket #270, at 65:20-
7 25; 112:18-113:2; 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 45:16-17. Mr.
8 Lujano did not know, however, whether or how Mr. de la Torre turned the funds over to Mr.
9 McCleuhan and Mr. Lujano did not inquire because “[Mr.] de la Torre told [Mr. Lujano] that he
10 was going to do everything and for [Mr. Lujano] to trust him. And if he is a man of God, I’m
11 relying to trust him.” See 8/22/08 Transcript, Docket #270, at 66:1-5. Mr. McCleuhan, on the
12 other hand, testified that Mr. de la Torre did not deliver the \$25,000 deposit.⁴⁷ See 7/25/08
13 Transcript, Docket #269, at 39:5-13; 53:8-14; 9/24/08 Transcript, Docket #287, at 92:18-24;
14 95:13-15. Instead, Mr. McCleuhan said the deposit was delivered by a “third party” whom Mr.
15 McCleuhan could not, or would not, recall. See 7/25/08 Transcript, Docket #269, at 48:20-
16 49:4; 53:8-14; 71:1-14.

17 While the Court believes it is highly likely that the deposit was delivered to Mr.
18 McCleuhan by Mr. Guerra, it is clear that the source of the \$25,000 deposit was Mr. Guerra’s
19 other son, Curtis Guerra.

20 Specifically, on December 8, 2005, Curtis Guerra wrote a \$25,000 check to Eagle Home

21 ⁴⁵Mr. Lujano testified that he met Joey Guerra in 2003 or 2004. When asked if Joey Guerra were
22 one of Mr. Lujano’s best friends, Mr. Lujano testified, “no.” See 10/15/08 Transcript, Docket #291, at
23 62:16-63:9. When pressed as to why Joey Guerra would provide Mr. Lujano with Joey’s financial
24 information so that Mr. Lujano could qualify for a larger loan to purchase property from Avon, which
was controlled by Joey’s father, Mr. Guerra, Mr. Lujano began to invoke the Fifth Amendment and
refused to answer any further questions on the subject. Id. at 63:10-67:22.

25 ⁴⁶Mr. Lujano testified that despite the fact that he had been at Mr. McCleuhan’s office several
26 times, it didn’t occur to him to give Mr. McCleuhan the initial \$25,000 deposit personally. See 8/22/08
Transcript, Docket #270, at 114:9-11; 114:24-115:1.

27 ⁴⁷Mr. McCleuhan also testified that the \$25,000 that he received was not in cash. See 9/24/08
Transcript, Docket #287, at 92:18-24.

1 Loans. See Exhibit A at p. 1. Also on December 8, 2005, Mr. McCleuhan wrote a \$25,000
2 check made payable to Mr. Guerra from the Eagle Home Loans account. Id. at p. 2. Mr.
3 McCleuhan testified that he wrote the check to Mr. Guerra to facilitate Mr. Guerra obtaining a
4 cashier's check for the required \$25,000 deposit. See 7/25/08 Transcript, Docket #269, at 61:9-
5 16; 73:1-14. As is reflected by the bank time and date stamps, Mr. Guerra used the \$25,000
6 Eagle Home Loans check to purchase the \$25,000 cashier's check, made payable to the Stanley
7 A. Zlotoff Trust Account, which was used for the initial deposit required by the Sale Order. See
8 Exhibit A at p. 2; 7/25/08 Transcript, Docket #269, at 61:24-25. Thereafter, Mr. Guerra
9 delivered the \$25,000 cashier's check to Mr. Zlotoff. See 10/27/08 Transcript, Docket #292, at
10 12:1-15.⁴⁸

11 Mr. Guerra testified that the \$25,000 check written by Curtis Guerra on December 8,
12 2005, was not intended to be used for the initial deposit on the Property, but instead, was an
13 unrelated "investment" in Mr. McCleuhan's business, Eagle Home Loans. See 9/24/08
14 Transcript, Docket #287, at 138:19-140:2. Despite his evasive and equivocal answers in other
15 parts of his testimony, however, Mr. McCleuhan testified, in no uncertain terms and at
16 numerous different points during his testimony, that he and Curtis Guerra did not have a business
17 relationship, there were no financial arrangements between he and Curtis Guerra, and Curtis
18 Guerra never invested in Mr. McCleuhan's business. See, 7/25/08 Transcript, Docket #269, at
19 32:2-5; 77:15-22; 93:10-15; 10/6/08 Transcript, Docket #289, at 77:25-78:10. In addition, after
20 reviewing his records, Mr. McCleuhan testified that there was no other transaction (i.e., loan,
21 refinance, etc.) pending with Curtis Guerra when the check was received. See 9/24/08
22 Transcript, Docket #287, at 76:21-77:22. Ultimately, Mr. McCleuhan admitted that Curtis
23 Guerra's \$25,000 check was the money that was used to purchase the cashier's check used for

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25 ⁴⁸Mr. Zlotoff testified that he did not deposit the \$25,000 cashier's check into his trust account
26 until approximately one month after he received it because there was uncertainty regarding whether the
27 check that he had been given would be used. See 10/27/08 Transcript, Docket #292, at 15:13-14.
28 Specifically, Mr. Zlotoff testified that Mr. Guerra represented to Mr. Zlotoff that the buyer's funding
was in flux and there was an expectation that the check would be replaced by a different buyer or by
different funding. Id. at 14: 9-15; 15:25-16:7; 46:9-11.

1 the initial down payment on the purchase of the Property. See 9/24/08 Transcript, Docket #287,
2 at 81:6-13. Thus, notwithstanding Mr. Guerra's self-serving testimony to the contrary, there is
3 sufficient competing evidence and testimony establishing that the \$25,000 deposit came directly
4 from Curtis Guerra.

5 **I. \$100,000 Deposit**

6 Mr. Lujano's testimony as to the \$100,000 deposit was vague and inconsistent. For
7 example, he initially testified that he could not remember how much money he gave Mr. de la
8 Torre after the initial \$25,000 deposit, whether he made one, two, three or four additional
9 payments to Mr. de la Torre, or when the payments were made. See 8/22/08 Transcript, Docket
10 #270, at 68:14-69:4; 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 42:3-16. Upon
11 further questioning, however, he was able to "remember" that he gave Mr. de la Torre the
12 \$100,000 deposit in \$100 bills. See 9/10/08 Transcript in Case No. 06-5127, Docket #145, at
13 43:21-44:2; 46:4-8. When asked why he didn't give the deposit directly to Mr. McClehan,
14 Mr. Lujano testified, "Mr. de la Torre seemed trustworthy to me. I met him at a church. I didn't
15 think he was going to do anything. He connected me. He hooked me up with people that were
16 taking care of this. I thought he formed part of the whole thing, and I trusted him." Id. at 47:6-
17 14.

18 Mr. McClehan testified that neither Mr. Lujano nor Mr. de la Torre personally
19 delivered the \$100,000 deposit.⁴⁹ See 7/25/08 Transcript, Docket #269, at 39:5-13; 53:8-14;
20 9/24/08 Transcript, Docket #287, at 92:18-24; 95:13-15. Instead, the evidence presented at the
21 OSC hearing indicates that on January 9, 2006, Mr. McClehan wrote a \$100,000 check from
22 his Eagle Home Loan bank account, which was used to purchase a \$100,000 cashiers check.
23 See, Exhibit B at pp.1 and 4; 7/25/08 Transcript, Docket #269, at 63:21-64:5; 65:3-14; 73:15-74.
24 There was not a corresponding deposit into the Eagle Home Loans account prior to Mr.
25 McClehan writing the \$100,000 check, and Mr. McClehan admits that he advanced the

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27 ⁴⁹Mr. McClehan also testified that the \$100,000 that he received was not in cash. See 9/24/08
28 Transcript, Docket #287, at 92:18-24.

1 money for the purpose of obtaining the cashiers check for the required second deposit. See
2 Exhibit B at p. 3; 7/25/08 Transcript, Docket #269, at 76:5-77:10.⁵⁰

3 Mr. Guerra brought the \$100,000 cashier's check in to Mr. Zlotoff's office on January 9,
4 2006. See 10/27/08 Transcript, Docket #292, at 13:9-14:5. Mr. Zlotoff made a copy of the
5 check and returned the original to Mr. Guerra, at Mr. Guerra's request.⁵¹ Id. at 13:9-14:7; 16:16-
6 18. Mr. Guerra returned the cashier's check to Mr. McClehan and Mr. McClehan re-
7 deposited it into his Eagle Home Loans account on January 11, 2006.⁵² See, Exhibit B at pp. 2
8 and 3; 7/25/08 Transcript, Docket #269, at 74:20-25.

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10 ⁵⁰While Mr. McClehan initially denied advancing any funds on behalf of Mr. Lujano, he
11 subsequently testified that he did advance the \$100,000 on Mr. Lujano's behalf. See 7/25/08 Transcript,
12 Docket #269, at 38:18-22; 76:5-77:14. He also testified, however, that generally when he does advance
13 funds for clients, he has a relationship with that client. See 9/24/08 Transcript, Docket #287, at 87:6-18.
14 The Court finds Mr. McClehan's assertion that he advanced funds on behalf of Mr. Lujano to be
15 specious. First, Mr. Lujano claimed that he was never told what arrangements were being made to pay
the \$100,000. See 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 43:14-20. Second, and
more importantly, Mr. McClehan had no relationship with Mr. Lujano and had first met Mr. Lujano
in 2005, in connection with this transaction. See 7/25/08 Transcript, Docket #269, at 110:3-8. The more
likely explanation (and the only one that makes sense in the context of this case) is that Mr. Guerra
asked Mr. McClehan to advance the money and Mr. McClehan, having worked with Mr. Guerra
over many years, consented.

16 ⁵¹Mr. Zlotoff explained that he returned the check to Mr. Guerra at Mr. Guerra's request, because
17 there was uncertainty regarding whether the checks that he had been given would be used. Specifically,
18 Mr. Guerra told Mr. Zlotoff that the buyer was struggling, that funding was in flux and there was an
expectation that a new buyer may come in and the check would be replaced. See 10/27/08 Transcript,
19 Docket #292, at 14: 9-15; 15:25-16:7. Mr. Zlotoff admitted that he was stretching the terms of Judge
Grube's Sale Order and that he put himself at risk by doing so, but claimed he was simply assisting in
the closing of the deal. Id. at 16:8-15; 86:5-10; 97:10-22. When asked, Mr. Zlotoff could not come up
with a coherent reason why, if the buyer was struggling and potentially on the verge of default, Mr.
Zlotoff would have returned a \$100,000 non-refundable deposit to Mr. Guerra, except to say, "It was
foolish... I just trusted that [Mr. Guerra] would see to the close of escrow." Id. at 85:15-86:4; see also
10/30/08 Transcript, Docket #293, at 30:13-18.

22 ⁵²Mr. McClehan testified that he purchased the cashier's check, but then was told by Mr.
23 Zlotoff that the check was not needed. Thereafter, Mr. McClehan testified that he re-deposited the
cashier's check into the Eagle Home Loans account. Mr. McClehan testified that the cashier's check
24 never left his possession. See 7/25/08 Transcript, Docket #269, at 74:16-75:25; 9/24/08 Transcript,
Docket #287, at 114:3-115:6.

25 Contrary to Mr. McClehan's testimony, however, Mr. Zlotoff testified that Mr. Guerra brought
26 the check to Mr. Zlotoff's office and Mr. Zlotoff made a copy and returned the original check to Mr.
27 Guerra. See 10/27/08 Transcript, Docket #292, at 13:9-14:7; 16:16-18; 47:20-48:3. Mr. Zlotoff's
testimony is supported by the correspondence he sent to Jung Park on January 25, 2006, which attached
a copy of the check. Id. at 45:10-46:1. Mr. Zlotoff further denies that he spoke with Mr. McClehan
regarding the \$100,000 check. Id. at 16:23-17:4; 22:3-10; 25:5-11.

1 **J. Commission**

2 Mr. McCleuhan admitted that Eagle Home Loans received a \$4,000 loan broker fee, as
3 well as an \$18,300 real estate commission on the sale of the Property. See 7/25/08 Transcript,
4 Docket #269, at 42:14-20; 46:11-21; 48:8-13; 9/24/08 Transcript, Docket #287, at 82:24-83:1.
5 Mr. McCleuhan alleged that Eagle Home Loans was not acting as an agent for anyone on the
6 sale of the Property and, instead, was simply acting as a loan broker. See 7/25/08 Transcript,
7 Docket #269, at 42:21-24; 43:2-5; 48:4-7. He subsequently changed his testimony and testified
8 that Eagle Home Loans was representing Mr. Lujano as the purchaser of the Property. Id. at
9 46:11-24; 46:25-47:16.⁵³

10 Mr. McCleuhan's statements that Eagle Home Loans only acted as a loan broker, or that
11 Eagle Home Loans represented Mr. Lujano as the purchaser, however, are not consistent with
12 the other facts of this case. Specifically, it was Mr. Guerra, acting on behalf of seller Avon, who
13 approached Mr. McCleuhan about finding a buyer for the Property, and it was Mr. McCleuhan
14 who allegedly did find the buyer. Further, Mr. McCleuhan testified that he did not take
15 instruction from Mr. Lujano (his purported buyer client) because “[Mr. Lujano] would not have
16 any idea.” See 7/25/08 Transcript, Docket #269, at 86:4-8. Instead, Mr. McCleuhan testified
17 that he took his instruction from Avon’s counsel, Mr. Zlotoff.⁵⁴ Id. at 84:21-86:24. Finally, the
18 Seller Final Closing Statement reveals that an \$18,300 commission was paid to Eagle Home
19 Loans as the “Listing Broker.” See Seller Final Closing Statement, attached as Exhibit A to the
20 Status Conference Statement filed by Mr. Zlotoff on 2/22/06, Docket #53. The only possible
21 conclusion, therefore, is that Eagle Home Loans was representing Avon as the seller and that Mr.
22 McCleuhan was taking instruction from Mr. Guerra, his friend and trusted business associate

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25 ⁵³Interestingly, when being peppered by questions from Trustee’s counsel, Mr. Tate, Mr. McCleuhan changed his testimony again and admitted that Eagle Home Loans was acting as the seller’s agent. See 9/24/08 Transcript, Docket #287, at 37:9-11.

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27 ⁵⁴Mr. Zlotoff testified, however, that he did not ever personally speak with Mr. McCleuhan during the entirety of the sale transaction. See 10/27/08 Transcript, Docket #292, at 10:8-9; 16:19-17:6; 22:3-10; 25:5-11.

1 for over twenty years.⁵⁵

2 Mr. McClehan also claims that he ultimately referred the real estate commission to Mr.
3 Hernandez because Mr. Hernandez requested it.⁵⁶ See 9/24/08 Transcript, Docket #287, at
4 66:14-86:4. When asked what Mr. Hernandez did to earn the commission, Mr. McClehan
5 stated that he had “contacted” Mr. Lujano. See 7/25/08 Transcript, Docket #269, at 42:14-20;
6 47:19-22; 48:1-16; 88:17-89:25; 9/24/08 Transcript, Docket #287, at 38:16-20.⁵⁷

7 Mr. McClehan admitted, however, that he never actually gave Mr. Hernandez the
8 commission check. See 9/24/08 Transcript, Docket #287, at 72:7-9. Mr. McClehan further
9 testified that Mr. Hernandez requested that Mr. McClehan pay the commission to Mr. Zlotoff.
10 Mr. McClehan testified that he told Mr. Hernandez that he was not going to pay taxes on
11 money that he did not keep. Thus, Mr. Hernandez allegedly told Mr. McClehan to prepare an

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19 ⁵⁵The Court recognizes that it is possible that Mr. Guerra told Mr. McClehan, and therefore,
20 Mr. McClehan acted on the assumption, that the instructions were coming from Mr. Zlotoff. Given
21 Mr. McClehan’s inconsistent testimony and apparent attempts to hide his connections and interactions
with Mr. Guerra, however, the Court finds it is not probable. Regardless, whether Mr. McClehan took
instruction from Mr. Zlotoff or Mr. Guerra, the conclusion is the same; Eagle Home Loans was acting
on behalf of the seller Avon, and not on behalf of the buyer Metricz or Mr. Lujano.

22 ⁵⁶Mr. Hernandez was allegedly a director of Metricz and the person who referred Mr. Lujano to
23 Mr. McClehan. See 7/25/08 Transcript, Docket #269, at 27:17-28:7; 9/10/08 Transcript in Case No.
24 06-5127, Docket #145, at 33:25-34:3; 9/24/08 Transcript, Docket #287, at 43:10-44:7. It was also
25 revealed at the OSC hearings and through a declaration by Mr. Hernandez, however, that Mr Hernandez
26 was a long-time friend Mr. Guerra, he had done work for Mr. Guerra, and Mr. Guerra and Mr.
27 Hernandez have shared a post office box for many years. See 10/6/08 Transcript, Docket #289, at
28 16:14-22; see also Declaration of Carlos Hernandez re Order to Show Cause, filed December 5, 2008,
Docket #294, at ¶ 4.

29 ⁵⁷When asked how Eagle Home Loans could share the commission with Mr. Hernandez, who
30 was not a real estate agent, Mr. McClehan quickly backtracked and alleged that it was simply a
“referral fee.” See 9/24/08 Transcript, Docket #287, at 82:4-19.

1 IRS Form 1099 for a "Mr. Flores,"⁵⁸ but to forward the money to Mr. Zlotoff.⁵⁹ Id. at 68:5-15;
2 69:2-15; 72:10-22.

3 **K. \$118,000 Shortfall After Close of Escrow**

4 At the December 7, 2005 Sale Hearing, the Court approved the sale of the Property to
5 Metricz for a total purchase price of \$610,000. See Order Authorizing Sale Free and Clear of
6 Interests, Docket # 41, at 2:9-19. Of that amount, \$125,000 was to be from the \$25,000 and
7 \$100,000 non-refundable cash deposits made on specified dates, and \$485,000 was to be funded
8 through a loan paid by close of escrow. Id. After payment of Long Beach Mortgage Company's
9 deed of trust, the County of San Joaquin property taxes, a 3% realtor's commission and normal
10 closing costs, the remainder of the funds (expected to be approximately \$300,000) were to be
11 placed in Mr. Zlotoff's trust account, with no funds to be disbursed without further order of the
12 Court. Id. at 2:23-3:7. Escrow was to close no later than February 9, 2006. Id. at 2:17-18.

13 Escrow closed on February 3, 2006. See Declaration of Mohamed Poonja in Support of
14 Motion to Approve Compromise of Controversy, Docket #136, at 7:7. On the day that escrow
15 closed, Mr. Zlotoff sent the title company instructions for disbursement of the remaining funds,
16 despite the fact that he had not received and/or deposited the \$100,000 nonrefundable deposit
17 into his trust account, and despite the fact that he had not obtained an order from the Court,
18 authorizing transfer of the funds. See 10/27/08 Transcript, Docket #292, at 103:23-105:9.

19 Subsequently, Mr. Zlotoff received the closing statement and a check for \$167,774.90
20 from the title company. It was then that Mr. Zlotoff realized that the sale had closed, despite a

21 ⁵⁸Mr. McClehan testified that he did not know who Mr. Flores was, had never met Mr. Flores
22 and had never spoken with Mr. Flores. See 9/24/08 Transcript, Docket #287, at 69:23-24; 70:2-3; 73:9-
23 13. Despite this, Mr. McClehan allegedly agreed to issue a form 1099 to a man he had never met, for
24 funds Mr. Flores never received. Id. at 69:16-22. Interestingly enough, while Mr. McClehan
25 admitted to instructing his accountant to issue the 1099 to Mr. Flores, Mr. McClehan was unable to
26 produce a copy of the 1099 because, due to a fortuitous clerical error at the accountant's office, the
27 accountant never sent it out. Id. at 73:6-8; Declaration of Howard Hildreth, Docket #288, at ¶ 4.

28 ⁵⁹The Declaration of Carlos Hernandez, which was procured by Mr. McClehan, mentions
29 nothing about the commission, Mr. Hernandez's alleged request to receive the commission, or Mr.
30 Hernandez's subsequent request that the commission be paid to Mr. Zlotoff. See Declaration of Carlos
31 Hernandez, Docket #294. It seems that if Eagle Home Loans really did refer the commission to Mr.
32 Hernandez, this would have been addressed by the Hernandez Declaration.

shortage in the purchase price of \$118,277.11.⁶⁰ See 10/27/08 Transcript, Docket #292, at 17:19-22; 21:13-17; 67:14-68:5. Thereafter, Mr. Zlotoff called Mr. Guerra and followed up with a letter confirming that Mr. Guerra would bring Mr. Zlotoff a cashier's check for the shortage amount. Id. at 17:23-18:6; 21:18-20; 32:12-19.

On February 21, 2006, a check drawn on Curtis Guerra's account, in the amount of \$100,277.11, was issued to Eagle Home Loans.⁶¹ See Exhibit C at p. 1; 7/25/08 Transcript, Docket #269, at 66:16-67:6; Further Supplemental Responsive Declaration of James McClehan to Order to Show Cause, Docket #272, at ¶ 2. Mr. McClehan testified that while he thought it was odd that Eagle Home Loans would receive such a check after escrow had closed, he didn't recall having any discussions with anyone or asking any questions of any of the parties regarding the check because "[t]he transaction was closed. I wasn't interested in it." See 9/24/08 Transcript, Docket #287, at 93:9-94:6.

Despite "not remembering" any discussions with anyone regarding the check, Mr. McClehan testified that on the same date, he wrote a check in the amount of \$118,277.11,

⁶⁰The Seller Final Closing Statement reflected \$118,277.11 in "Funds received from buyer - Credit." See Seller Final Closing Statement, attached as Exhibit A to the Status Conference Statement filed by Mr. Zlotoff on 2/22/06, Docket #53. Mr. McClehan testified that he, as the individual who had been procuring the cashiers checks for the required deposits, had not paid the \$118,277.11 into the escrow account. See 9/24/08 Transcript, Docket #287, at 134:9-23. Mr. Zlotoff also testified that he never represented to the escrow company that there was \$118,277.11 in his trust account, to be credited to the purchase price. See 10/27/08 Transcript, Docket #292, at 49:11-14.

Mr. Zlotoff testified that he thought it was odd that escrow could close without the \$118,000 in funds being deposited and that he never got a satisfactory explanation from the title company as to why that had occurred. Id. at 18:9-14. Despite this, however, Mr. Zlotoff testified that he did not discuss the matter with Mr. Guerra or anyone else, nor did he take any steps to inform the Court of the irregularity, even though there was a status conference scheduled for February 24, 2006, and he testified that he was uneasy about having to tell the Court that the sale had closed and that the estate was short of funds. Id. at 18:21-25; 21:1-10; 31:23-25; See also Status Conference Statement filed by Mr. Zlotoff on 2/22/06, Docket #53 (wherein Mr. Zlotoff simply states, "The sale of debtor's real property located in Lathrop, California closed. . . All funds including those designated as credits have been paid to the undersigned to be held in trust.")

The Court suspects that it was Mr. Guerra who authorized the closing of the escrow, despite the fact that the \$118,277.11 had not been paid.

⁶¹Mr. Lujano testified that no one told him that Curtis Guerra wrote a \$100,000 check as part of the purchase of the Property, and that he did not know why Curtis Guerra would have written such a check. See 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 47:24-48:10; 49:9-14.

payable to the Bank of Santa Clara.⁶² See Exhibit C at p. 2; 7/25/08 Transcript, Docket #269, at 67:14-68:2; 79:10-80:3. Mr. McClehan admitted that the check was then used to purchase a cashier's check, also dated February 21, 2006, in the amount of \$118,277.11, made payable to the Stanley A. Zlotoff Trust Account. See Exhibit C at p. 3; 7/25/08 Transcript, Docket #269, at 68:7-21; Further Supplemental Responsive Declaration of James McClehan to Order to Show Cause, Docket #272, at ¶ 1. Mr. McClehan also admitted that this \$118,277.11 cashier's check was made up of the \$100,277.11 from Curtis Guerra, plus the \$18,000 real estate commission.⁶³ See Further Supplemental Responsive Declaration of James McClehan to Order to Show Cause, Docket #272, at ¶ 2. Subsequently, Mr. Guerra delivered the \$118,277.11 cashier's check to Mr. Zlotoff's office. See 10/27/08 Transcript, Docket #292, at 19:1-7. Mr. Zlotoff never asked Mr. Guerra about the source of the money. Id. at 20:23-25; 27:2-3.

L. Retention of Mr. Goldstein by Metricz

At some point, Metricz⁶⁴ learned that the Sewer Hookups entitlements on the Property had been terminated by the County of Lathrop. At that point, Metricz hired Mr. Goldstein to file the Adversary Proceeding.⁶⁵

⁶²As detailed below, it was apparent to the Court from Mr. McClehan's evasive testimony, that he was knowingly attempting to hide the true source of the funds used for the non-refundable deposits. What is not clear was whether Mr. McClehan knew of the significance of this deception to the Court.

⁶³Mr. McClehan initially testified that he did not know where the additional \$18,000 came from. See 7/25/08 Transcript, Docket #269, at 87:1-22. He later testified that the \$18,000 was, in fact, the commission on the sale of the Property, but he claimed that Mr. Hernandez instructed him to pay the funds to Mr. Zlotoff because it was Mr. Hernandez's commission. See 9/24/08 Transcript, Docket #287, at 33:17-34:14; 35:15-25. As stated previously, no evidence supports Mr. McClehan's position that the commission was referred to Mr. Hernandez. Even if the Court were to accept that the commission was referred to Mr. Hernandez, however, the Court notes that the full amount of the commission was \$18,300. Thus, Mr. McClehan's position does not address the question of where the other \$300 went. Given no evidence to the contrary, the Court can only presume that it stayed with Mr. McClehan.

⁶⁴To avoid confusion, the Court uses "Metricz" when talking about actions allegedly taken by Metricz. The Court believes, however, that all actions taken by Metricz, were in fact taken by or directed by, Mr. Guerra.

⁶⁵In response to the question why Metricz decided to hire counsel, Mr. Lujano testified that he did so because "they started accusing me of something I knew nothing about. I just wanted to buy some property and they got me involved in all this." See 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 28:4-6. The Court can only guess who "they" are, but finds the response odd.

Initially, Mr. Lujano testified that he got Mr. Goldstein's name when he called information. See 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 27:12-19. Later, he agreed that he had picked Mr. Goldstein's name out of the Yellow Pages. Id. Subsequently, he changed his story a third time and testified that he got Mr. Goldstein's information "from 'the people' who were assisting [him] with the purchase of the Property." Id. at 50:18-51:10 (internal quotations added). When pressed further, he testified that he believed that either Mr. de la Torre or Mr. Jaramillo told him to call Mr. Goldstein.⁶⁶ See 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 51:13-19; 57:7-10. Mr. Lujano's various stories regarding how he came to choose Mr. Goldstein, were unbelievable.⁶⁷

M. The Mediation

As indicated previously, on August 2, 2007, after the Trustee's appointment, and in an attempt to resolve various disputes, the Trustee, Metricz, Mr. Guerra, the Aguilar Trustee and Mr. Aguilar's parents participated in a mediation conducted by the Honorable Thomas E. Carlson (previously defined as the "Mediation"). See Motion to Approve Compromise of Controversy, Docket #135; Status Conference Statement in Case No. 06-5127, Docket #52, at 2:6-9. Mr. Goldstein and Mr. Jaramillo attended the Mediation on behalf of Metricz. See 10/6/08 Transcript, Docket #289, at 108:17-109:22.

Prior to the Mediation, Mr. Goldstein informed Mr. Jaramillo that Mr. Jaramillo needed to appear on behalf of Metricz. See 10/6/08 Transcript, Docket #289, at 111:5-14. Mr. Jaramillo allegedly told Mr. Goldstein that he was no longer president of Metricz and did not want to

⁶⁶Mr. Jaramillo claims that he did not meet Mr. Goldstein until right before the Mediation. See 10/6/08 Transcript, Docket #289, at 109:12-13; 10/30/08 Transcript, Docket #293, at 75:23-76:25. Thus, he could not have referred Mr. Lujano to Mr. Goldstein. In addition, Mr. Goldstein testified that he has never seen or met Mr. de la Torre. See 10/6/08 Transcript, Docket #289, at 74:2-13. Thus, it does not appear that Mr. de la Torre referred Mr. Lujano to Mr. Goldstein.

⁶⁷The Court believes that Mr. Lujano's varied and unbelievable accounts of how he found Mr. Goldstein were all attempts to avoid stating the truth; that it was Mr. Guerra who referred Mr. Lujano to Mr. Goldstein. It seems virtually impossible that given all of the lawyers in San Jose and the South Bay, Mr. Lujano, who lived and worked in San Jose, would retain a sole practitioner from the East Bay. Further, Mr. Goldstein had an established relationship with Mr. Guerra and was representing Mr. Guerra in unrelated matters at the time. The Court finds Mr. Lujano's testimony on this point to be false.

1 attend the Mediation. Id. at 111:15-20. Mr. Jaramillo claims that he was told by Mr. Goldstein
2 that he remained Metricz's President and that he had to attend the Mediation. Id. at 111:10-24.
3 Mr. Jaramillo claims that while he did ultimately attend, he had no part in the negotiations, did
4 not discuss the litigation with Mr. Goldstein,⁶⁸ and approved the settlement on Metricz's behalf
5 solely based on Mr. Goldstein's advice.⁶⁹ Id. at 109:11-22; 112:3-18; 114:8-12; 134:6-17; 149:8-
6 15.

7 Pursuant to the settlement reached in the Mediation, the Trustee issued a check for
8 administrative expenses in the amount of \$25,000 to Metricz. See Declaration of Samuel E.
9 Goldstein re Deposit of Payment to Metricz in Case No. 06-5127, Docket #93, at ¶ 2. Mr.
10 Goldstein claims that he arranged for Mr. Lujano to endorse the check, but Mr. Lujano was
11 unavailable. Id. at ¶ 3. Subsequently, Mr. Goldstein, accompanied by Mr. Guerra, went to Mr.
12 Jaramillo's restaurant and told Mr. Jaramillo to sign the check.⁷⁰ Id.; 10/6/08 Transcript, Docket
13 #289, at 112:18-113:12; 131:16-132:5. Pursuant to Mr. Goldstein's instruction, Mr. Jaramillo
14 did endorse the check. See 10/6/08 Transcript, Docket #289, at 112:15-22.

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17 ⁶⁸Mr. Goldstein disputes Mr. Jaramillo's recollection and insists that he spent substantial time
18 explaining to Mr. Jaramillo the Adversary Proceeding, the underlying facts, the proposals made to
19 resolve it, and Metricz's settlement stance. See Declaration of Samuel E. Goldstein re Communications
20 with Robert Jaramillo in Case No. 06-5127, Docket #99, at ¶¶ 22 and 24. The Court does not know
21 whose recollection of events is correct. If Mr. Jaramillo is being truthful about his involvement in the
settlement negotiations, the Court queries who negotiated and made decisions on Metricz's behalf at the
22 settlement? If Mr. Jaramillo is not being truthful, he clearly had more post-sale involvement in Metricz
than he would admit to.

23 ⁶⁹Mr. Lujano testified that he had no knowledge of the Mediation, and that he simply "[gave]
24 authorization for whatever had to be done to be done." See 10/15/08 Transcript, Docket #291, at 8:4-21.
When pressed on the matter, Mr. Lujano claimed that he gave Mr. Jaramillo authorization to proceed
with the lawsuit. Id. at 8:22-9:5. When asked why he didn't personally attend the Mediation, he
testified that he "wasn't told [he] had to go." Id. at 9:20-23. Mr. Lujano did not know who went to the
Mediation on Metricz's behalf, nor did he know the terms of the settlement. Id. at 9:24-10:10.

25 ⁷⁰Interestingly, when Mr. Jaramillo first testified about signing the check, he made no mention
26 of the fact that Mr. Guerra accompanied Mr. Goldstein to the restaurant. It was not until Mr. Tate
27 specifically asked who was with Mr. Goldstein that Mr. Jaramillo admitted Mr. Guerra's attendance.
See 10/6/08 Transcript, Docket #289, at 112:18-113:12.; 131:16-132:5. Mr. Goldstein similarly failed
28 to disclose Mr. Guerra's presence. See Declaration of Samuel E. Goldstein re Deposit of Payment to
Metricz in Case No. 06-5127, Docket #93, at ¶ 3.

1 **N. Status of the Property and Metricz**

2 Since the sale, various events regarding Metricz and the Property have taken place. First,
3 after the sale closed, Mr. Lujano entered into discussions with Mr. Guerra to develop the
4 Property. See 10/15/08 Transcript, Docket #291, at pp. 82-85. It is unclear whether Mr. Guerra
5 and Mr. Lujano came to any agreement regarding development, or whether any development
6 occurred.

7 Second, on or about November 10, 2008, Metricz lost the Property to foreclosure.
8 See Metricz's Closing Memorandum of Points and Authorities in Response to the Court's OSCS
9 [sic], Docket #297, at 7:4-5.

10 Third, on April 19, 2010, the Adversary Proceeding was dismissed for lack of
11 prosecution. See Order Taking Trial Off Calendar and Dismissing Adversary Proceeding for
12 Lack of Prosecution in Case No. 06-5127, Docket #139. Metricz currently has no known
13 assets.⁷¹

14 Finally, review of the California Secretary of State website indicates that Metricz is a
15 suspended California Corporation.⁷² It is not clear how long Metricz has been a suspended
16 corporation.

17 **III . DISCUSSION**

18 **A. Introduction**

19 The tales woven by the parties to this proceeding are complicated, inconsistent, and in
20 many respects, unbelievable. The one common factor, however, is Mr. Guerra. All parties and
21 their actions lead back to him. Despite the fact that Mr. Lujano, Mr. McClenehon, Mr. Jaramillo
22 and Mr. Goldstein all actively assisted Mr. Guerra in his efforts to hide his connection to Metricz
23 from the Court, the inevitable conclusions are: (1) Mr. Guerra orchestrated Metricz's purchase of
24 the Property; and (2) not only did Mr. Guerra have a connection to Metricz that he failed to

25 ⁷¹See Metricz's Closing Memorandum of Points and Authorities in Response to the Court's
26 OSCS [sic], Docket #297, at 8:11-12.

27 ⁷²See California Secretary of State Website, Business Search, <http://kepler.sos.ca.gov/cbs.aspx>
28 (last visited July 15, 2010).

1 disclose, he, in fact, **was** Metricz. Mr. Guerra was also fortuitous to have substantial (if
2 unintentional) assistance from Mr. Zlotoff, who appears to have set aside his professional
3 judgment and abdicated his fiduciary duties to the estate and his duties as an officer of the Court.
4 In the process, Mr. Zlotoff unknowingly aided Mr. Guerra in his dishonest endeavor. While the
5 Property ultimately appears to have sold for an amount that was equal to, or greater than its
6 value, the end result was a grave harm to the Bankruptcy Estate by virtue of the fact that the
7 Trustee and his counsel were required to spend large amounts of time and money attempting to
8 figure out exactly what happened. This is money that could have and should have gone to
9 creditors. Perhaps the bigger concern, however, is the violation committed by the parties against
10 the integrity of the bankruptcy system. For these and the following reasons, the Court intends to
11 utilize its inherent powers to sanction the parties and to compensate the estate for the losses it
12 has suffered as a direct result of the parties' obstructive actions.

13 **B. Witness Credibility**

14 The question to be answered by this OSC was whether there were any undisclosed
15 connections between Mr. Guerra and Metricz, and whether the parties attempted to conceal any
16 such connections. The key evidence in this proceeding was from witness testimony that, in
17 many respects, conflicts materially with other witness testimony and with the documentary
18 evidence. Accordingly, the credibility of the witnesses is a significant factor in the Court's
19 analysis and ultimate conclusion.

20 Where the testimony of a witness is not believed, the trier of fact may simply disregard it.
21 Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 512 (1984). The Court's
22 determinations regarding credibility are given due regard on appeal. Anderson v. City of
23 Bessemer City, N.C., 470 U.S. 564, 573-74 (1985).

24 After hearing the conflicting and ever-changing stories of the witnesses over many days
25 of testimony, the Court has concluded that for various reasons, most of the witnesses did not
26 testify truthfully in many material respects. The end result is that the Court was hamstrung in its

ability to determine the true facts surrounding the sale of the Property.⁷³ Despite this pervasive lack of candor, however, the Court found some witnesses to be slightly more credible than others and thus, affords their testimony greater weight.

1. Joe Guerra

Mr. Guerra was not a credible witness and his blatant misrepresentations about the most mundane topics casts doubt on all of his testimony.

In his declaration in support of the Motion to Sell the Property, Mr. Guerra represented, under penalty of perjury, that he had no connections with anyone involved with Metricz or the sale to Metricz. At the Sale Motion hearing, in response to concerns of the Court and the parties about an insider connection, Mr. Guerra represented to Ms. Dumas that he had no connections with anyone involved in Metricz. Mr. Guerra also sat silently by, allowing Ms. Dumas to represent to the Court that, “[Mr. Guerra] said he has no connections with Mr. Jaramillo, the president of Metricz Corporation. . . . Mr. Guerra told me he has no connections with Carlos Hernandez, who is. . . one of the shareholders of Metricz[.] Mr. Guerra says . . . he doesn’t know any of these people, he’s never met them, he’s never seen them. He has no prior connection.” Unfortunately for Mr. Guerra, the facts that came to light during the course of this OSC show just how blatant these misrepresentations were.

Specifically, despite telling Ms. Dumas at the Sale Hearing that he had no connection with Mr. Jaramillo, there was testimony at the OSC hearings that Mr. Jaramillo works for attorney Thomas Salciccia, Mr. Guerra is a client of Mr. Salciccia's, Mr. Jaramillo has worked on Mr. Guerra's file, Mr. Guerra periodically worked in Mr. Salciccia's office, and following the sale, Metricz mail came to Mr. Salciccia's office and Mr. Jaramillo left the mail to be picked up by Mr. Guerra. See 10/6/08 Transcript, Docket #289, at 97:5-98:24; 183:21-185:14; 10/27/08 Transcript, Docket #292, at 54:4-55:2.

⁷³The Court is also hamstrung in one other important respect. Many exhibits were introduced during the course of the OSC hearings. Few of them, however, were admitted (or requested to be admitted) and many were subject to objection. Thus, documents that were potentially helpful cannot be used by the Court. Where possible, the Court has utilized the testimony of the parties regarding these non-admitted documents. Unfortunately, in many cases, the testimony is significantly less helpful than the documents themselves would have been.

1 Further, despite telling Ms. Dumas that he had no connection with Mr. Hernandez and
2 allowing Ms. Dumas to repeat that representation to the Court, Mr. Guerra testified at the OSC
3 hearing that he has known Mr. Hernandez for ten years and that Mr. Hernandez has done work
4 for Mr. Guerra in the past. See 10/6/08 Transcript, Docket #289, at 16:14-22. A declaration
5 signed by Mr. Hernandez indicates an even closer relationship; Mr. Guerra and Mr. Hernandez
6 are friends and have shared a post office box “for many years.” See Declaration of Carlos
7 Hernandez re Order to Show Cause, Docket #294, at ¶ 4.

8 Mr. Guerra also testified at his Rule 2004 examination that he did not know how Mr.
9 Zlotoff came to possess \$300,000 in total sale proceeds, when he only received \$167,000 in
10 proceeds from the title company at the closing of the sale, and that Mr. Zlotoff never requested
11 that Mr. Guerra obtain further funds to replenish the estate. See Deposition of Joe Guerra, dated
12 July 19, 2007, at 113:25-116:1. When asked about it at the OSC, Mr. Guerra invoked the Fifth
13 Amendment. See 10/6/08 Transcript, Docket #289, at 45:8-48:21. Mr. Guerra’s 2004
14 examination testimony, however, was contradicted by Mr. Zlotoff’s testimony that after escrow
15 closed, Mr. Zlotoff received the closing statement from the title company and realized that there
16 was a shortage of \$118,277.11. Thus, Mr. Zlotoff contacted Mr. Guerra and made arrangements
17 for Mr. Guerra to bring a cashier’s check for the shortage amount. See 10/27/08 Transcript,
18 Docket #292, at 17:19-18:6; 21:13-20; 32:12-19; 67:14-68:5. Mr. Zlotoff testified that
19 subsequently, Mr. Guerra delivered the \$118,277.11 cashier’s check to Mr. Zlotoff’s office. Id.
20 at 19:1-7.

21 Finally, in the most puzzling of mistruths, in his deposition, Mr. Guerra denied that Mr.
22 Goldstein referred him to Mr. Zlotoff to represent Avon in this bankruptcy. See Deposition of
23 Joe Guerra, dated July 19, 2007, at 227:18-25. This testimony was contradicted by both Mr.
24 Zlotoff and Mr. Goldstein. See 10/6/08 Transcript, Docket #289, at 62:16-63:2 (Mr. Goldstein
25 testified that he referred Mr. Guerra to Mr. Zlotoff to represent Avon in the bankruptcy);
26 10/30/08 Transcript, Docket #293, at 35:19-37:22 (Mr. Zlotoff testified that Mr. Goldstein
27 referred Mr. Guerra to Mr. Zlotoff to represent Avon in the bankruptcy). Mr. Guerra’s
28 unwillingness to tell the truth about such an inconsequential matter highlights the reason why the

1 Court found him not to be a credible witness.

2 **2. James McClehan**

3 Mr. McClehan did not appear at the December 7, 2005 Sale Hearing, nor did he file
4 any papers with the Court making any representations relating to the sale.⁷⁴ His presence as a
5 party to this OSC was largely a function of the fact that Mr. Guerra allegedly approached Mr.
6 McClehan to obtain a buyer for the sale of the Property and ultimately, Mr. McClehan
7 obtained a buyer, arranged the loan for Mr. Lujano and received a loan broker's commission, as
8 well as a real estate commission from the proceeds of the sale. See 7/25/08 Transcript, Docket
9 #269, at 26:15-29:22; 34:1-35:15. Thus, the Court required information regarding how the sale
10 came about and the extent of Mr. McClehan's involvement and knowledge.

11 Mr. McClehan appeared to the Court to be a somewhat credible witness, although
12 evasive on some points and inconsistent on others. For example, when asked whether he had
13 any business transactions with Curtis Guerra, Mr. McClehan originally stated unequivocally
14 that he did not have any such transactions, but then changed his testimony to state that after the
15 Property was sold, Eagle Home Loans had arranged a loan for Curtis Guerra to purchase an
16 investment property. See 7/25/09 Transcript, at 31:25-32:13; 52:1-8. He subsequently filed a
17 declaration in which he stated that Eagle Home Loans had brokered a loan for Curtis Guerra,
18 which closed in March 2004. See Responsive Declaration of James McClehan to Order to
19 Show Cause, Docket #263, at ¶ 3. In addition, Mr. McClehan was evasive about whether he
20 advanced monies for the purchase of the Property; first testifying that he never did so under any
21 circumstances, then admitting that he did advance funds to clients regularly and, in fact, had
22 advanced funds in this case. See 7/25/09 Transcript, at 38:18-22; 40:8-41:6; 76:5-77:14.

23 Interestingly, Mr. McClehan's recollection of certain events was vague as to some
24 facts, and crystal clear as to others, even when those events occurred on the same day or in the
25 same transaction. For example, with regards to the initial \$25,000 deposit, Mr. McClehan

26
27 ⁷⁴While there were allegations that the Pre-Sale Qualification Letter was authored and signed
28 by Mr. McClehan, it was not clear to the Court that this was actually the case. Further, the Pre-Sale
Qualification Letter was never actually presented to the Court.

1 testified that he did not recall the check from Curtis Guerra arriving at his office, or what the
2 Curtis Guerra check was for, but he clearly recalled writing Mr. Guerra a check to purchase a
3 cashier's check and remembered that he did so because he was too busy to purchase the cashier's
4 check himself. Id. at 49:1-4; 53:8-14; 71:1-14; 73:1-14; 104:11-106:18.

5 The Court is under the impression that some of the evasiveness, inconsistency and
6 selective recall may have resulted from the fact that Mr. McCleuhan was the first witness to
7 testify in this proceeding, testified multiple times throughout the proceeding, and may have been
8 second-guessing actions he routinely performs, which were improper, or that he believed may
9 have been construed to be improper in the bankruptcy context. The Court also notes that Mr.
10 McCleuhan testified that he has known Mr. Guerra for twenty-five years, Mr. Guerra has
11 referred many clients to Mr. McCleuhan over the years, and Eagle Home Loans had arranged
12 numerous loan for Guerra family members. Id. at 29:23-31:15; 10/6/08 Transcript, Docket #289,
13 at 15:6-16:13. Thus, his inconsistent and evasive testimony may have been the result of an
14 attempt to assist a business contact who has referred many clients (and the associated
15 commissions) over the years.⁷⁵

16 **3. Raymundo Lujano**

17 Mr. Lujano was not a credible witness. He knew little to nothing about the Property or
18 its purchase (even though it was purportedly purchased by him).⁷⁶ He spun a tale of people who
19 had never been seen by anyone else but him and could not be contacted by him⁷⁷ and of cash that

20 ⁷⁵This desire to assist Mr. Guerra is supported by Mr. McCleuhan's testimony that in his career,
21 prior to the sale of the Property, Mr. McCleuhan had only handled five sale transactions and that the
22 sale of the Property was the only sale transaction that he had been involved in as an agent involving a
bankruptcy proceeding. See 7/25/08 Transcript, Docket #269, at 56:18-57:2.

23 ⁷⁶See generally 10/15/08 Transcript, Docket #291, at 12:11-17:18 (wherein Mr. Lujano testified
24 in various ways that he did not know the specifics of the sale and then testified that "I didn't ask for any
details. I don't even know how all this works"); 18:18-19:24 (wherein Mr. Lujano did not know the
25 details regarding how the Property was transferred from his name to Metricz).

26 ⁷⁷See 8/22/08 Transcript, Docket #270, at 83:12-84:9 and 10/15/08 Transcript, Docket #291, at
27 68:24-69:8, wherein Mr. Lujano describes Mr. de la Torre as a generic dark-skinned male who comes
and goes from Mexico, does not have a phone number, and is only seen periodically in church. Despite
the elusive nature of Mr. de la Torre, Mr. Lujano trusted Mr. de la Torre implicitly and allegedly gave
him upwards of \$150,000 in cash to purchase a property that Mr. Lujano had never seen, no questions
asked, all because Mr. de la Torre was a "man of [G]od" and Mr. Lujano "trusted him."

1 could not be traced, in an attempt to make this Court believe that he, in fact, orchestrated and
2 purchased the Property. His testimony was unbelievable in all respects and the Court gives it
3 little weight.

4 **4. Robert Jaramillo**

5 The Court did not find Mr. Jaramillo to be credible. Mr. Jaramillo testified that he has a
6 law degree and practiced law in California for twenty-five years before resigning from the bar.⁷⁸
7 See 10/6/08 Transcript, Docket #289, at 109:23-110:9. The Court does not believe that a lawyer
8 with twenty-five years of experience would agree to be president of a corporation for a day,
9 without any documentation. Nor does the Court believe that such an experienced attorney would
10 attend a Mediation and sign off on a settlement agreement or sign a declaration under penalty of
11 perjury simply because Mr. Goldstein told him to do so.⁷⁹

12 Mr. Jaramillo's veracity is also called into question as a result of his comments and
13 conduct at the Sale Hearing. At the OSC hearing, Mr. Jaramillo purported to have known little
14 to nothing about the sale, the Property and/or Metricz. His remarks at the Sale Hearing,
15 however, were quite specific as to the details of the transaction and the involved parties.⁸⁰ The

16 ⁷⁸Mr. Jaramillo resigned from the California bar, with charges pending. See 10/6/08 Transcript,
17 Docket #289, at 171:10-22.

18 ⁷⁹See 10/6/08 Transcript, Docket #289, at 156:5-157:17, wherein Mr. Jaramillo testified that if
19 Mr. Goldstein had presented him with a declaration stating that at all times relevant, Mr. Jaramillo was
president of Metricz, he would have signed it simply because Mr. Goldstein told him to do so.

20 ⁸⁰Among the comments made by Mr. Jaramillo at the Sale Hearing were:

21 “I do a lot of real estate in Lathrop, you know. That's where . . . I'm located. There's a - no acre
22 of land that, you know, it's zoned in this zoning of other units that will sell for 590. So when
it comes down to appraisal, it's probably not going to appraise for 590, . . . maybe 575 . . . at the
23 most. . . . [I]f they keep on bidding . . . higher, no one is going to get a loan unless they put . . .
. a bigger down payment down.”

24 See Transcript of 12/7/05 Sale Hearing, Docket #191, at 16:11-23.

25 “Now, like I said, I do a lot of transactions in Lathrop. Just eight months ago, I saw an acre right
across the street from this property for . . . \$325,000. And like I said prior to this, is that the
26 moneys that is [sic] starting to be offered on this property is going to be way above appraisal.”

27 Id. at 38:8-13.

28 In addition, Ms. Dumas represented the following on behalf of Mr. Jaramillo:

only conclusion the Court can draw is that Mr. Jaramillo's comments at the Sale Hearing were either truthful, or were intended to instill a false sense of confidence in the Court regarding Metricz's legitimacy, if not intended to mislead Judge Grube outright. Either way, Mr. Jaramillo's remarks at the Sale Hearing raise questions about the credibility of his testimony at the OSC.

Finally, the Court has the distinct impression that Mr. Jaramillo had a much closer relationship with Mr. Guerra than he would admit, and likely knew that Mr. Guerra was orchestrating the sale and purchase of the Property (even if he was not aware of the significance).⁸¹ Unfortunately, that appears to the Court to have resulted in Mr. Jaramillo being less than truthful about what he did and what he knew. The end result is that his testimony is not credible.

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"Mr. Jaramillo, who represents Metricz Corporation, has said he would. . . be able to put down \$116,000 within 30 days."

Id. at 6:13-15.

"Mr. Jaramillo did not bring a prequalification letter, but he has represented he would be able to present one . . . by four o'clock this afternoon. However, he does not have it now. And he said that the reason he did not bring it with him is because he didn't know what the final amount would be, what the final sale amount was . . . because he knew he was getting into a bidding situation. So he wanted to make sure that his letter had the actual amount of the actual loan if he was going to be the prevailing bidder

Id. at 6:24-7:7.

None of the statements made by Ms. Dumas were contradicted, clarified, or amended by Mr. Jaramillo.

⁸¹Specifically, Mr. Jaramillo worked for Mr. Salciccia, and Mr. Guerra was a client of Mr. Salciccia. Mr. Jaramillo worked on Mr. Guerra's file at Mr. Salciccia's office. Mr. Guerra claims to also have worked for Mr. Salciccia. Most damning, however, is the fact Mr. Jaramillo admitted that after the sale to Metricz closed, mail for Metricz began to arrive at Mr. Salciccia's office and Mr. Jaramillo set it aside for Mr. Guerra. See 10/6/08 Transcript, Docket #289, at 185:13-14. When asked why he would set the mail aside for Mr. Guerra and not give it to Mr. Lujano, Mr. Jaramillo testified, "I just know he was . . . involved with this whole business[.] . . . [W]e have a number of corporations that come into the office. We don't know who they belong to, and we leave them for Joe. . . . I presumed Joe Guerra was involved with Metricz. . . . [It's] just the way Joe does things. . . . I just believe Joe uses corporations instead of himself. That's my belief. . . . He likes to use corporations. He likes to develop properties for corporations. . . . [T]hat's his modus operandi." Id. at 186:21-189:10.

1 **5. Samuel Goldstein**

2 While Mr. Goldstein represented Metricz at the OSC hearings, he appeared to be more
3 interested in representing Joe Guerra. See 9/24/08 Transcript, Docket #287, at 122:20-124:25
4 (Mr. Goldstein questioning Mr. McClenehan and attempting to elicit testimony that Joe Guerra,
5 Jr.'s bank account was not Mr. Guerra's bank account); 10/6/08 Transcript, Docket #289, at
6 48:6-49:9 (Mr. Goldstein objecting when Mr. Tate questioned Mr. Guerra regarding the
7 \$118,000 shortfall); 10/30/08 Transcript, Docket #293, at 88:16-89:13; 90:1-10 (Mr. Goldstein
8 objecting to Mr. Tate's questioning of Mr. Jaramillo regarding Mr. Jaramillo's practice of
9 leaving Metricz mail that came to Mr. Salciccia's office, for Mr. Guerra to pick up); 12/15/08
10 Transcript, Docket #295, at 33:10-34:21 (Mr. Goldstein arguing that signature cards for bank
11 accounts in Curtis Guerra's and Joe Guerra, Jr.'s names were not signed by Mr. Guerra,
12 hypothesizing about Mr. Guerra's use of his son's bank accounts, and hypothesizing (without
13 any evidence or supporting testimony from Mr. Lujano) that Curtis Guerra may have actually
14 received \$25,000 in cash from Mr. Lujano). This could be due to the established relationship
15 that Mr. Goldstein had with the Guerra family. See 10/6/08 Transcript, Docket #289, at 61:1-25
16 (Mr. Goldstein represented Mr. Guerra in connection with adversary proceeding); 62:5-15 (Mr.
17 Goldstein represented Curtis Guerra in state court action); 62:16-63:2 (Mr. Goldstein referred
18 Mr. Guerra to Mr. Zlotoff to represent Avon in its bankruptcy).

19 Mr. Goldstein's true loyalties were also revealed when: (1) Mr. Jaramillo testified that
20 Mr Goldstein brought Mr. Guerra with him to Mr. Jaramillo's restaurant to have Mr. Jaramillo
21 sign the Metricz settlement check (See 10/6/08 Transcript, Docket #289, at 131:16-132:5)⁸²; (2)
22 Mr. Goldstein testified that prior to obtaining Mr. Jaramillo's e-mail address, he would send
23 documents and/or information to Mr. Guerra, because "[Mr. Guerra] knew where Mr. Jaramillo
24 could be located," (See 10/30/08 Transcript, Docket #293, at 109:22-110:9); and (3) Mr.
25 Goldstein testified that information for at least one declaration "may have come indirectly from

26 ⁸²Oddly enough, when Mr. Goldstein was recounting the events surrounding the endorsement
27 of the settlement check, he never mentioned that he took Mr. Guerra with him to have it signed. See
28 Declaration of Samuel E. Goldstein re Deposit of Payment to Metricz in Case No. 06-5127, Docket #93,
at ¶ 3.

1 Mr. Lujano through Mr. Guerra," (Id. at 112:21-24).⁸³ ⁸⁴

2 The Court finds it curious that of all the lawyers in the South Bay, Mr. Lujano chose Mr.
3 Goldstein (whose office is in the East Bay and who had an established relationship with Mr.
4 Guerra) to represent Metricz. Mr. Lujano testified that it was Mr. Jaramillo who recommended
5 Goldstein.⁸⁵ See 10/15/08 Transcript, Docket #291, at 75:4-10. The Court is skeptical.
6 Regardless, this "coincidence" in Metricz's choice of lawyer, combined with Mr. Goldstein's
7 connections with Mr. Guerra and Mr. Goldstein's actions during the OSC indicate that Mr.
8 Goldstein's loyalties were not solely to Metricz and that his testimony and comments to the
9 Court were less than candid.

10 **6. Stanley Zlotoff**

11 The Court found Mr. Zlotoff to be a credible witness to the extent that he was able to
12 testify. As was very evident, however, Mr. Zlotoff's record-keeping and monitoring of this case
13 were less than ideal. See generally 10/27/08 Transcript, Docket #292, at pp. 29-30; 35-40; 43-
14 44. Thus, any inconsistencies or inaccuracies in his testimony appear to be more a function of
15 his lax handling of the case, rather than an intentional desire to mislead the Court.

16 / / /

17 / / /

18 ⁸³Mr. Goldstein justified his actions by stating, "Mr. Lujano has a lot of trouble with English,
19 and I have to communicate sometimes through somebody who knows English better." See 10/30/08
20 Transcript, Docket #293, at 112:24-113:1. Mr. Goldstein went on to testify, "Mr. Lujano has some
21 trouble with English, and sometimes I communicated with Mr. Guerra who does speak English and does
22 speak Spanish. . . . [Mr. Guerra] was also a witness to some of the events that are the subject of the
adversary proceeding." Id. at 113:12-19. Mr. Goldstein also admitted that he doesn't remember
whether he talked to Mr. Jaramillo directly when he sent documents to Mr. Jaramillo, through Mr.
Guerra. Id. at 122:13-124:1.

23 ⁸⁴Mr. Goldstein's testimony at the OSC hearings appears to be inconsistent with his statement
24 in his July 11, 2008 declaration, wherein he stated that Mr. Jaramillo and Mr. Lujano "have been my
only contacts for Metricz." See Declaration of Samuel E. Goldstein in Response to the Court's May 15,
2008 OSC in Case No. 06-5127, Docket #82, at ¶ 10. In a later declaration, Mr. Goldstein attempted
25 to rectify the inconsistency by disclosing that he communicated "from time to time with [Mr. Lujano
and Mr. Jaramillo] through [Mr.] Guerra," and that he used Mr. Guerra as a courier to deliver
26 declarations to Mr. Jaramillo. See Declaration of Samuel E. Goldstein re Communications with Robert
Jaramillo in Case No. 06-5127, Docket #99, at ¶¶ 3, 8, 11, 15, 17, 18.

27 ⁸⁵Mr. Jaramillo denies this and claims that he never met Mr. Goldstein until shortly before the
Mediation, in August of 2007. See 10/30/08 Transcript, Docket #293, at 105:6-12.

1 **C. The Court's Authority to Sanction for Misconduct**

2 **1. In General**

3 In general, the three vehicles available for a court to deter and sanction misconduct are
4 found in Federal Rule of Bankruptcy Procedure 9011⁸⁶, 28 U.S.C. § 1927,⁸⁷ and 11 U.S.C.
5 § 105(a)⁸⁸. See Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (holding that bankruptcy
6 courts have inherent powers to impose sanctions for a party's misconduct); Caldwell v. Unified
7 Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 284 (9th Cir. 1996) (Congress' grant
8 to bankruptcy courts of the inherent power to sanction improper conduct is codified by 11 U.S.C.
9 § 105(a)); Brown v. Baden (In re Yagman), 796 F.2d 1165, 1184 (9th Cir. 1986), cert. denied,
10 484 U.S. 963 (1987) (stating that the "overriding purpose" of Rule 11 is deterrence); Beatrice

11 ⁸⁶Federal Rule of Bankruptcy Procedure 9011 provides, in pertinent part,

12 (b) By presenting to the court (whether by signing, filing, submitting, or later advocating)
13 a petition, pleading, written motion, or other paper, an attorney or unrepresented party is
14 certifying that to the best of the person's knowledge, information, and belief, formed after an
inquiry reasonable under the circumstances –

15 (1) it is not being presented for any improper purpose[; and]

16

17 (3) the allegations and other factual contentions have evidentiary support[.]

18

19 (c) If, after notice and a reasonable opportunity to respond, the court determines that
20 subdivision (b) has been violated, the court may. . . impose an appropriate sanction upon the
attorneys, law firms, or parties that. . . are responsible for the violation.

21 Fed.R.Bankr.P. 9011(b)(1) and (b)(3) and (c) (West 2010).

22 ⁸⁷28 U.S.C. § 1927 provides,

23 Any attorney or other person admitted to conduct cases in any court of the United States or any
Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously
may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees
reasonably incurred because of such conduct."

24 28 U.S.C. § 1927 (West 2010).

25 ⁸⁸Section 105(a) provides,

26 The court may issue any order, process, or judgment that is necessary or appropriate to carry out
the provisions of this title. No provision of this title providing for the raising of an issue by a
party in interest shall be construed to preclude the court from, sua sponte, taking any action or
making any determination necessary or appropriate to enforce or implement court orders or
rules, or to prevent an abuse of process.

27 11 U.S.C. § 105(a) (West 2010).

1 Foods Co. v. New England Printing & Lithographing Co., 899 F.2d 1171, 1177 (Fed. Cir. 1990)
2 (holding that a “principal purpose” of § 1927 is deterrence).

3 While various statutes and rules provide for the imposition of sanctions, a court’s
4 inherent powers are “governed not by rule or statute but by the control necessarily vested in
5 courts to manage their own affairs so as to achieve the orderly and expeditious disposition of
6 cases.” Chambers v. NASCO, Inc., 501 U.S. at 43 (citation omitted). Therefore, “if in the
7 informed discretion of the court, neither the statute nor the Rules are up to the task, the court
8 may safely rely on its inherent power [to impose sanctions].” Id. at 50.

9 Here, neither a statute, nor the Federal Rules of Bankruptcy Procedure are “up to the
10 task” of combating the bad faith exhibited by the parties. Federal Rule of Bankruptcy Procedure
11 9011 does not suffice. Mr. Guerra did sign a false declaration that was filed with the Court in
12 connection with the sale, which stated that he had no connection with Metricz. Mr. Guerra,
13 however, is not an attorney or an unrepresented party, as contemplated by that Rule. Thus, Rule
14 9011 is inapplicable. Similarly, 28 U.S.C. § 1927 does not suffice because a bankruptcy court is
15 not a “court of the United States” in the Ninth Circuit. Miller v. Cardinale (In re Deville), 361
16 F.3d 539, 546 (9th Cir. 2004) (citations omitted). Thus, the only remedy to redress the wrongs
17 committed by the parties is the use of the Court’s inherent powers.

18 **2. The Court’s Inherent Authority to Sanction under 11 U.S.C. § 105(a)**

19 The court’s inherent authority to sanction includes not only the authority to sanction a
20 party, but also the authority to sanction the conduct of a nonparty who participates in abusive
21 litigation practices, or whose actions or omissions cause the parties to incur additional expenses.
22 See Chambers v. NASCO, Inc., 501 U.S. at 50-51 (affirming imposition of sanctions on an
23 individual for conduct before other tribunals that constituted an abuse of process, even though
24 the individual was not a party when the misconduct occurred); In re Rainbow Magazine, Inc., 77
25 F.3d at 278 (upholding sanctions levied under the court’s inherent powers against corporate
26 debtor’s principal who orchestrated the bad faith filing of the bankruptcy petition); Corder v.
27 Howard Johnson & Co., 53 F.3d 225, 232 (9th Cir. 1994) (“[E]ven in the absence of statutory
28 authority, a court may impose attorney’s fees against a nonparty as an exercise of the court’s

1 inherent power to impose sanctions to curb abusive litigation practices") (citing Roadway
2 Express, Inc. v. Piper, 447 U.S. 752, 764 (1980); SECO Nevada v. McMordie (In re Holloway),
3 884 F.2d 476, 477 (9th Cir. 1989); Moten v. Bricklayers, Masons and Plasterers Int'l. Union of
4 America, 543 F.2d 224 (D.C. Cir. 1976)).

5 This inherent power to impose sanctions extends to a "full range of litigation abuses[,]"
6 including those where a party has acted in bad faith, vexatiously, wantonly, or for oppressive
7 reasons, when a party participates in an abuse of process or other dilatory conduct, or when the
8 court finds "that fraud has been practiced upon it, or that the very temple of justice has been
9 defiled." Chambers v. NASCO, Inc., 501 U.S. at 46-47 (citations omitted); In re Rainbow
10 Magazine, 77 F.3d at 284; Fink v. Gomez, 239 F.3d 989, 993-94 (9th Cir. 2001).

11 Before imposing sanctions under its inherent sanctioning authority, a court must make an
12 explicit finding of bad faith or conduct that is tantamount to bad faith. Knupfer v. Lindblade (In
13 re Dyer), 322 F.3d 1178, 1196-97 (9th Cir. 2003) (citing Fink v. Gomez, 239 F.3d 989, 992-93
14 (9th Cir.2001)). The Court's inherent authority extends only to the imposition of compensatory
15 sanctions, including those sanctions that make a party whole for expenses caused by the
16 opponent's obstinacy. Chambers v. NASCO, Inc., 501 U.S. at 45-46; In re Deville, 361 F.3d at
17 547; In re Dyer, 322 F.3d 1178, 1198 (9th Cir. 2003); Corder v. Howard Johnson & Co., 53 F.3d
18 at 232. The court must also "exercise caution in invoking its inherent power, and it must comply
19 with the mandates of due process, both in determining that the requisite bad faith exists and in
20 assessing fees." In re Deville, 361 F.3d at 545.

21 **1. Joe Guerra**

22 This entire proceeding was made necessary as a result of a single lie by Mr. Guerra - that
23 neither he (as principal of Avon), nor Avon had any connection with Metricz. The length and
24 expense of the proceeding was directly proportional to Mr. Guerra's continued bad faith refusal
25 to tell the truth regarding the transaction. Despite his protestations to the contrary, the
26 circumstantial and actual evidence surrounding the transaction indicate that he was intimately
27 involved with Metricz and that he orchestrated the sale to, and purchase by, Metricz.

28 First, Mr. Guerra chose Mr. McClenehhan to "market" the Property on behalf of the estate.

1 However, Mr. Guerra never took the steps that a true independent fiduciary would have taken.
2 When he approached Mr. McCleuhan about marketing the Property, Mr. Guerra provided only
3 a rough idea of the details and did not provide a price range. He had only one or two
4 conversations with Mr. McCleuhan regarding the sale. He did not take any steps to ensure that
5 the Property was shown to multiple individuals or was even listed for sale. He never asked Mr.
6 McCleuhan if the Property had been advertised and never personally showed the Property to
7 anyone. There is no indication that he attempted to obtain the highest price, or even cared what
8 that price was. In fact, Metricz's initial offer was \$400,000, and it was not until Mr. Aguilar
9 brought Mr. Sayles to the auction that the price increased to the final purchase price of \$610,000.
10 All of this indicates one of two things: (1) Mr. Guerra was not fulfilling his fiduciary duties; or
11 more likely, (2) he was involved in the purchase of the Property, thus it was not necessary for
12 him to follow the procedures that a debtor-in-possession would typically follow to ensure a sale
13 at the best and highest price to an independent third party.

14 Second, despite signing a declaration in connection with the sale, which stated (under
15 penalty of perjury) that he had no relationship to or connection with Metricz, and despite
16 allowing Ms. Dumas to repeat that representation to the Court at the Sale Hearing, Mr. Guerra
17 admitted at the OSC that he has known Mr. Hernandez (a Metricz shareholder) for ten years and
18 that Mr. Hernandez has done work for Mr. Guerra in the past. The declaration signed by Mr.
19 Hernandez indicated an even closer relationship; Mr. Guerra and Mr. Hernandez are friends and
20 have shared a post office box "for many years." Thus, there was clearly a connection between
21 Mr. Guerra and Metricz.

22 Third, the loan Application that was filled out by Mr. Lujano contained information
23 regarding financial accounts belonging, not to Mr. Lujano, but to Mr. Guerra's son, Joe Guerra,
24 Jr. Despite initially testifying that the accounts were his, Mr. Lujano eventually admitted that
25 they were Joe Guerra, Jr.'s accounts and that Joe Guerra, Jr. was allowing Mr. Lujano to use the
26 account information so that Mr. Lujano could qualify for a higher amount of financing.

27 Fourth, the initial \$25,000 deposit for the purchase of the Property was paid not by Mr.
28 Lujano, but by another of Mr. Guerra's sons, Curtis Guerra. Mr. Guerra tried to claim that the

\$25,000 check from Curtis Guerra to Eagle Home Loans was an investment by Curtis in Mr. McClehan's business. Mr. McClehan adamantly denied that Curtis Guerra ever invested any monies in Eagle Home Loans and, after equivocating for an extended period, finally admitted that the check from Curtis Guerra was used for the initial down payment on the purchase of the Property.

Fifth, the required \$100,000 deposit for the Purchase of the Property was also paid by Curtis Guerra. This, however, was only after Mr. Zlotoff realized that escrow had closed and was short by \$118,000. Mr. Zlotoff demanded that Mr. Guerra turn over the funds and Curtis Guerra wrote a check for \$100,000.

Sixth, Mr. Guerra continued to be involved in Metricz's affairs following the close of the sale. Specifically, after the Mediation concluded and the Trustee wrote Metricz a \$25,000 check, Mr. Guerra accompanied Mr. Goldstein to Mr. Jaramillo's restaurant to have the check endorsed. Further, Mr. Goldstein used Mr. Guerra as a conduit to send Metricz documents and information to Mr. Jaramillo. In addition, Mr. Goldstein admitted that information for at least one Metricz declaration may have come from Mr. Lujano, and through Mr. Guerra. Finally, Mr. Jaramillo testified that Metricz mail began to be delivered to Mr. Salciccia's office in 2007 and that all Metricz mail that came to Mr. Salciccia's office was left for Mr. Guerra.

Mr. Guerra was clearly and intimately involved with Metricz and with Metricz's purchase of the Property. His misstatements in connection with the Sale Hearing and his subsequent lies at the OSC hearings wasted judicial time and resources and defiled the integrity of the bankruptcy system. Mr. Guerra's conduct was tantamount to bad faith. As a result, the Court intends to sanction Mr. Guerra under its inherent powers, in order to compensate the estate for the expenses incurred in uncovering his bad faith conduct. Thus, Mr. Guerra shall be jointly and severally liable, along with Mr. Lujano, Mr. Jaramillo and Mr. Goldstein (to the extent that Mr. Goldstein's liability is finally determined), for the fees and expenses incurred by the Trustee's counsel in investigating their conduct, bringing their misdeeds to the Court's attention, and participating in the OSC process. The exact amount of the judgment shall be determined following the submission of a fee application by the Trustee's counsel and a hearing by the Court

1 for reasonableness pursuant to 11 U.S.C. § 330.

2 **2. Raymundo Lujano**

3 Mr. Lujano appears to have been simply a pawn in Mr. Guerra's plan to have Metricz
4 purchase the Property. Unfortunately for Mr. Guerra, Mr. Lujano knew little to nothing about
5 the actual purchase, told stories of people who did not exist (i.e., Mr. de la Torre), and wove tales
6 that were simply unbelievable (i.e., collecting \$150,000 in "donations" and keeping the money in
7 cash at his house). In fact, no part of the web of lies spun by Mr. Lujano made any sense at all.
8 It is true that Mr. Lujano did not make any misrepresentations to the Court at the Sale Hearing
9 itself. Thus, he could have avoided sanctions entirely had he told the truth at the OSC. Instead,
10 he chose to act in bad faith, telling one implausible tale after another, all under penalty of
11 perjury.

12 The biggest and most ridiculous of the fabricated stories presented by Mr. Lujano was of
13 the existence of Mr. de la Torre. Mr. Lujano claims that Mr. de la Torre was intimately involved
14 in every aspect of the purchase; so much so that Mr. Lujano did not have to do anything and did
15 not know anything. Despite the alleged extensive participation in the sale by Mr. de la Torre, no
16 one else involved in the sale and with Metricz has ever seen or spoken with him. Further, the
17 Court finds it unbelievable that Mr. Lujano would trust Mr. de la Torre, a man with no known
18 residence or phone number, who only appeared at church periodically and went back and forth to
19 Mexico, with \$150,000 in cash, simply because Mr. de la Torre "was a man of God."

20 While the biggest fabrication was the existence of Mr. de la Torre, it was certainly not the
21 only one. Mr. Lujano claimed that he raised in excess of \$150,000 in cash from friends at Christ
22 the King church in San Jose. These funds were described as "gifts." However, Mr. Lujano had
23 no proof of receipt of any cash, and no records of the alleged "donors." In addition, despite the
24 fact that Mr. Lujano had numerous bank accounts, he claimed that he kept the donated cash at
25 his house, "because it was not his." While he claims to have turned the funds over to Mr. de la
26 Torre to be used to purchase his interest in Metricz and for Metricz to purchase the Property, he
27 could not recall how much he turned over, in how many installments, and when.

28 Mr. Lujano also claimed that he did not know Mr. Guerra and had no connection with

1 him. Mr. Lujano would like the Court to believe that all of his and Metricz's connections with
2 Mr. Guerra are coincidence. One or two events could constitute "coincidence." Mr. Guerra's
3 constant presence in the narrative, however, smacks of intentional design.

4 First, Mr. Lujano alleged that he "purchased" Metricz because Mr. de la Torre told him
5 that was the best way to purchase property. Mr. Lujano could have started his own corporation.
6 Instead, he purchased the corporation whose only member on the Board of Directors was Mr.
7 Hernandez, a long-time friend of Mr. Guerra, who shared a post-office box with Mr. Guerra.

8 Second, while Mr. Lujano claimed that he made the down payments on the Property, the
9 evidence is undisputed that both deposits came from Mr. Guerra's son, Curtis Guerra.

10 Third, of all the people in the world, Mr. Lujano hired Mr. Jaramillo to attend the Sale
11 Hearing on behalf of Metricz. Mr. Lujano claimed that it was Mr. de la Torre or Mr.
12 McCleuhan who suggested that Mr. Lujano hire Mr. Jaramillo. Given that Mr. de la Torre is
13 fictional⁸⁹ and Mr. McCleuhan testified that he had not met Mr. Jaramillo until the OSC
14 hearing, the Court is skeptical. Again, however, the connection to Mr. Guerra is inescapable.
15 Mr. Jaramillo worked for Mr. Salciccia. Mr. Salciccia was the agent for service of process for
16 both Avon and Metricz. Mr. Salciccia represented Mr. Guerra in various matters. Mr. Jaramillo
17 admitted to working on Mr. Guerra's file in at least one of those matters. Mr. Guerra testified at
18 his §341 meeting to working at Mr. Salciccia's office part time. Mr. Jaramillo testified that
19 when Metricz mail came to Mr. Salciccia's office, Mr. Jaramillo left it for Mr. Guerra. While
20 both Mr. Guerra and Mr. Jaramillo claimed that they knew each other only in passing, the
21 connections between the two are too extensive to ignore.

22 Fourth, Mr. Lujano testified that the information on the Application was his, despite the
23 fact that he later admitted that two of the accounts listed belonged to Mr. Guerra's son, Joe
24 Guerra, Jr.

25 Fifth, of all the attorneys in the Bay Area, Mr. Lujano hired Mr. Goldstein to represent
26 Metricz. Mr. Lujano's story as to how he came to hire Mr. Goldstein was tortured, at best.

27
28 ⁸⁹or is possibly an alias for Mr. Guerra

Initially, he stated that he called information. Then, he agreed that he had looked in the Yellow Pages. Both stories are highly unlikely, given that Mr. Goldstein practices in Walnut Creek and Mr. Lujano was in San Jose. When pressed, Mr. Lujano claimed that either Mr. de la Torre or Mr. Jaramillo suggested the he call Mr. Goldstein. This excuse also rings hollow as Mr. de la Torre is fictitious and Mr. Jaramillo testified that he never met Mr. Goldstein until the Mediation. The connection to Mr. Guerra in this instance is, once again, inescapable as Mr. Goldstein had represented Mr. Guerra previously and may have been representing Mr. Guerra at the time.

Finally, in what the Court believes is no coincidence at all, after Metricz purchased the Property, Mr. Lujano entered into discussions with none other than Mr. Guerra, to develop the Property.

Mr. Lujano was a willing pawn in Mr. Guerra's scheme to purchase the Property from the estate. Mr. Lujano could have admitted as much. Instead, he insisted on telling lie after lie. His bad faith conduct and false testimony are not without consequence. His fabrications wasted judicial time and resources, forced the Trustee to conduct extensive investigation and incur significant expense, and violated the integrity of the bankruptcy system as a whole. Thus, the Court intends to sanction Mr. Lujano under its inherent powers, to compensate the estate for the expenses incurred in investigating and uncovering his bad faith conduct. As a result, Mr. Lujano shall be jointly and severally liable, along with Mr. Guerra, Mr. Jaramillo and Mr. Goldstein (to the extent that Mr. Goldstein's liability is finally determined) for the fees and expenses incurred by the Trustee's counsel in investigating their conduct, bringing it to the Court's attention, and participating in the OSC hearings. The exact amount of the judgment shall be determined following the submission of a fee application by Trustee's counsel and a hearing by the Court for reasonableness pursuant to 11 U.S.C. § 330.

3. Robert Jaramillo

At the Sale Hearing, Mr. Jaramillo told Ms. Dumas that he had no connection with Mr. Guerra and allowed Ms. Dumas to repeat that representation and the representation that Metricz had no connection with Avon, to the Court. Mr. Jaramillo's evasive and untrue testimony at the

1 OSC hearing has convinced the Court that not only did Mr. Jaramillo lie under oath at the OSC
2 hearing, but he also lied at the Sale Hearing. While Mr. Jaramillo would not admit to a prior
3 relationship with Mr. Guerra or to knowing that Mr. Guerra was connected to Metricz and to the
4 purchase of the Property, his testimony and actions indicate otherwise.

5 First, Mr. Jaramillo was an experienced attorney, having practiced in California for
6 twenty-five years before resigning. He claims that Mr. Lujano contacted him, out of the blue, to
7 represent Metricz at the Sale Hearing. The Court finds it odd that Mr. Jaramillo did not appear
8 to think it was out of the ordinary for a stranger to contact him to represent an unknown
9 corporation in a legal proceeding, claiming that he had never done it before, but had seen it done.
10 The Court also finds it odd that an experienced lawyer did not require that anything regarding his
11 services be memorialized in writing. Instead, Mr. Jaramillo wants the Court to believe that he
12 agreed to represent a corporation that he knew nothing about, and a person whom he had not met
13 and for whom he only had a phone number, in a legal proceeding, for \$1,000 in cash.

14 Second, Mr. Jaramillo claims he took direction from Mr. Lujano, but Mr. Lujano lacked
15 even the most basic knowledge regarding the sale. For example, Mr. Jaramillo testified at the
16 OSC that he was told by Mr. Lujano that Mr. Jaramillo had authorization to bid up to \$675,000
17 for the Property. Mr. Lujano, however, claims he never gave Mr. Jaramillo a specific amount.
18 In addition, Mr. Jaramillo claimed that during a break at the Sale Hearing, he called Mr. Lujano
19 to obtain the Pre-Sale Qualification Letter. Mr. Lujano, however, could not remember speaking
20 with Mr. Jaramillo on the day of the sale, whether he had provided any paperwork to Mr.
21 Jaramillo, or even whether the letter was prepared at his direction. Mr. Lujano's lack of
22 knowledge regarding basic conversations that Mr. Jaramillo allegedly had with Mr. Lujano
23 convinces the Court that Mr. Jaramillo's testimony on these points was less than truthful. More
24 important, however, is the fact that Mr. Jaramillo refused to disclose who it was he was actually
25 receiving direction from. The only explanation that makes sense is that Mr. Jaramillo was
26 evasive because he wanted to distance himself from these proceedings and did not want to
27 disclose that he was actually receiving his direction from Mr. Guerra, and/or he knew that Mr.
28 Guerra was the individual orchestrating the Metricz's purchase of the Property from Avon.

1 Third, despite his testimony to the contrary, Mr. Jaramillo's activities on behalf of
2 Metricz were more extensive than simply appearing at a single hearing. In fact, following the
3 Sale Hearing in December 2005, Mr. Jaramillo represented Metricz at the Mediation, signed the
4 settlement check as Metricz's President, and may have signed various declarations on behalf of
5 Metricz. There was no reason to conceal these facts from the Court, except that Mr. Jaramillo
6 did not want to reveal his connection to Mr. Guerra or Mr. Guerra's connection to Metricz.

7 Fourth, Mr. Jaramillo concealed the fact that Mr. Guerra accompanied Mr. Goldstein to
8 Mr. Jaramillo's restaurant to sign the settlement check.

9 The most damning evidence, however, is not what Mr. Jaramillo refused to testify about,
10 but what he actually testified to. Specifically, Mr. Jaramillo testified that when mail addressed to
11 Metrciz came to Mr. Salciccia's office, Mr. Jaramillo would leave it for Mr. Guerra because Mr.
12 Jaramillo just "knew" that Mr. Guerra was involved. Further, Mr. Jaramillo testified that "this is
13 [Mr. Guerra's] M.O. He uses corporations to do, you know, develop properties and, you know,
14 it just seemed to me that that was consistent with the way he did business." See 10/6/08
15 Transcript, Docket #289, at 190:24-191:2.

16 Mr. Jaramillo could have been forthright about his actions, motivations and connections.
17 He chose not to, hoping that his vague and evasive testimony would end the inquiry. In the end,
18 however, his bad faith failure to be truthful extended the time and expense of this proceeding
19 exponentially. While Mr. Jaramillo may not have orchestrated the scheme for Mr. Guerra's
20 engineered purchase of the Property, he participated in it and then lied about his participation.
21 Thus, the Court intends to sanction Mr. Jaramillo under its inherent powers, to compensate the
22 estate for the expenses incurred in investigating and uncovering his bad faith conduct. As a
23 result, Mr. Jaramillo shall be jointly and severally liable, along with Mr. Guerra, Mr. Lujano and
24 Mr. Goldstein (to the extent that Mr. Goldstein's liability is finally determined), for the fees and
25 expenses incurred by the Trustee's counsel in investigating their conduct, bringing it to the
26 Court's attention, and participating in the OSC hearings. The exact amount of the judgment
27 shall be determined following the submission of a fee application by Trustee's counsel and a
28 hearing by the Court for reasonableness pursuant to 11 U.S.C. § 330.

1 **4. Samuel Goldstein**

2 Mr. Goldstein was not named in this OSC. He was, however, sworn in, and did testify.
3 While his testimony was limited, it clearly revealed that he was aware that Mr. Guerra was an
4 agent of Metricz and that Mr. Goldstein treated him as such. It also revealed that Mr. Goldstein
5 lied to the Court about Mr. Guerra's involvement with Metricz, and, when caught, attempted to
6 minimize Mr. Guerra's role as that of a "courier," in a continuing attempt to mislead the Court
7 regarding Mr. Guerra's involvement.

8 Specifically, in a declaration dated July 11, 2008, Mr. Goldstein represented, under
9 penalty of perjury, that Mr. Jaramillo and Mr. Lujano were his **only** contacts for Metricz. This
10 statement was false, as he later testified at the OSC that he would send documents, information
11 and declarations intended for Mr. Jaramillo, through Mr. Guerra, because it was Mr. Guerra
12 "who knew where Mr. Jaramillo could be located."⁹⁰ He further testified that he could not
13 remember whether he ever spoke with Mr. Jaramillo directly when he sent information and
14 documents to Mr. Jaramillo through Mr. Guerra.

15 In addition, Mr. Goldstein claims that he had trouble communicating with Mr. Lujano
16 because Mr. Lujano "ha[d] a lot of trouble with English." Thus, Mr. Goldstein had to
17 "communicate sometimes through somebody who [knew] English better." That someone was
18 Mr. Guerra. Mr. Goldstein also admitted that information for at least one declaration "came
19 indirectly from Mr. Lujano through Mr. Guerra."⁹¹

20 Finally, Mr. Guerra's participation in, and connections to, Metricz were made explicitly
21 clear through the testimony that came out inadvertently; that Mr. Guerra accompanied Mr.
22 Goldstein to Mr. Jaramillo's restaurant to obtain Mr. Jaramillo's signature on the Metricz

23
24 ⁹⁰Which begs the question as to why Mr. Goldstein could not locate his client, or could not
25 simply ask Mr. Guerra how to get in touch with Mr. Jaramillo so that Mr. Goldstein could communicate
26 directly with Mr. Jaramillo. The only logical answer is that Mr. Guerra was not only acting as an agent
27 for Metricz, but was likely also providing information and making decisions on behalf of Metricz.

28 ⁹¹The Court is not clear what it means to have information "come indirectly from Mr. Lujano
29 through Mr. Guerra." What is clear, however, is that Mr. Goldstein was relying on Mr. Guerra for
30 translation services and for information, when Mr. Guerra was clearly and intimately involved and
31 interested in Metricz and the Property.

1 settlement check. The Court can think of no reason why Mr. Guerra's presence was required,
2 unless he was involved with Metricz. Further, the fact that Mr. Goldstein neglected to mention
3 Mr. Guerra's presence tells the Court all it needs to know about Mr. Goldstein's attempts to hide
4 Mr. Guerra's involvement.

5 Despite Mr. Goldstein's equivocation and attempts to explain away Mr. Guerra's
6 constant presence in Metricz business, it is clear that Mr. Guerra was connected with Metricz
7 and participated in Metricz business following the sale of the Property. Mr. Goldstein's
8 statements to the contrary are simply false. Mr. Goldstein could have been honest and saved the
9 Court and all of the parties significant time and expense. He chose not to and instead, chose to
10 attempt to perpetuate the myth that Mr. Guerra was not involved. He was unsuccessful. Thus,
11 the Court tentatively intends to sanction Mr. Goldstein under its inherent powers, to compensate
12 the estate for the expenses incurred in investigating and uncovering his bad faith conduct. The
13 Court also tentatively intends to hold Mr. Goldstein jointly and severally liable, along with Mr.
14 Guerra, Mr. Lujano and Mr. Jaramillo for the fees and expenses incurred by Trustee's counsel in
15 investigating their conduct, bringing it to the Court's attention, and participating in the OSC. To
16 the extent that sanctions are finally levied, the exact amount of any judgment will be determined
17 following the submission of a fee application by Trustee's counsel and a hearing by the Court for
18 reasonableness pursuant to 11 U.S.C. § 330. Given that Mr. Goldstein was not a party to the
19 OSC or the Amended OSC, however, due process requires the Court to give Mr. Goldstein an
20 opportunity to respond. As a result, Mr. Goldstein shall have 30 days to respond in writing to
21 this Memorandum and the proposed sanctions. The Court will take the matter under submission
22 and issue a final decision following the expiration of the 30 days.

23 **5. Stanley Zlotoff**

24 Mr. Zlotoff was paid \$3,520 for his work as Avon's counsel in this case. See Order
25 Approving Application for Compensation, Docket #82. While his fees were low for a case of
26 this size, his monitoring of the case was inadequate, and it was nothing more than pure luck that
27 saved the estate from suffering significant losses. Perhaps the bigger problem, however, is the
28 fact that Mr. Zlotoff's failure to monitor this case allowed Mr. Guerra to abuse the sale process

1 and the bankruptcy system, and led directly to the issuance of the OSC and the time and expense
2 attendant to it.

3 Mr. Zlotoff personally attended the Sale Hearing. He knew that there were questions
4 regarding Metricz's disinterestedness and ability to purchase the Property. He was present for
5 the extensive discussion on the record and for the specific conditions articulated by the Court to
6 address the parties' concerns. He even prepared the Order that memorialized the conditions.
7 Yet he failed almost entirely to comply with the most important conditions, while taking steps
8 that could have caused grave harm to the estate.

9 Specifically, at the Sale Hearing, the Court stated that both the \$25,000 deposit and the
10 \$100,000 deposit were to be payable to Mr. Zlotoff's trust account, in certified funds, by dates
11 certain. See Transcript of 12/7/05 Sale Hearing, Docket #191, at 49:14-50:7. The Court asked
12 whether the \$100,000 deposit could go directly into escrow. Judge Grube declined, stating, "I
13 want a way to verify this. I think the . . . hundred thousand dollars goes to you, to your trust
14 account. . . . It's to be in certified funds into your trust account[.] And then I'll sign an order
15 thereafter authorizing you to transfer the \$125,000 to the title company. . . . If any of these things
16 don't occur, there's a default under the terms and conditions of the purchase." Id. at 49:20-
17 50:16. The Court went on to state, "Mr. Zlotoff, if there is a default you are **required** to declare
18 a default. You are required to notify opposing counsel and Ms. Dumas." Id. at 56:12-14. Mr.
19 Zlotoff's actions violated the Court's directives in multiple ways.

20 First, pursuant to the Sale Order, the initial non-refundable \$25,000 deposit was to be
21 made "in certified funds to the Stanley Zlotoff trust account by December 8, 2005, at 4:00 p.m."
22 See Order Authorizing Sale Free and Clear of Interests, Docket #41, at 2:9-14. Mr. Zlotoff
23 testified that he received the funds timely, but that he held them for approximately one month
24 before depositing them in his trust account, because Mr. Guerra told Mr. Zlotoff that the
25 Metricz's funding was in flux and there was an expectation that the check would be replaced by
26 a different buyer or by different funding.

27 Second, and more disturbing, was Mr. Zlotoff's treatment of the second non-refundable
28 deposit. The Sale Order provided that Metricz shall make a "\$100,000 nonrefundable deposit in

certified fund to the Stanley Zlotoff trust account by January 9, 2006, at 4:00 p.m.” Id. at 2:9-16. Mr. Zlotoff testified that Mr. Guerra brought the \$100,000 check to Mr. Zlotoff’s office on January 9, 2006. Instead of depositing the funds into his trust account, however, Mr. Zlotoff made a copy of the check, and returned the original to Mr. Guerra at Mr. Guerra’s request because Mr. Guerra again told Mr. Zlotoff that Metricz was struggling, its funding was in flux and the check may have to be replaced by a different buyer or by different funding. When asked why, if Metricz was struggling and potentially on the verge of default, Mr. Zlotoff would have returned a \$100,000 nonrefundable deposit to Mr. Guerra, Mr. Zlotoff could only state, “It was foolish. . . I just trusted that [Mr. Guerra] would see to the close of escrow.” See 10/27/08 Transcript, Docket #292, at 85:22-86:2. Not only did Mr. Zlotoff risk Metricz ultimately not being able to come up with the funds for the purchase and the loss of a nonrefundable deposit, he also risked Mr. Guerra misappropriating those funds. The failure to comply with the Court’s Order in this respect is utterly inexcusable.

Third, even after Mr. Guerra had indicated that Metricz might not be able to close the deal, Mr. Zlotoff failed to monitor the sale to ensure it complied with the Court’s conditions and to ensure that the sale closed properly. In particular, on the day the sale closed, Mr. Zlotoff sent the title company instructions for disbursement of the remaining funds, despite the fact that he had not received and/or deposited the \$100,000 nonrefundable deposit and despite the fact that he had not obtained an order authorizing transfer of the funds. His hollow explanation as to why he allowed the sale to close without accounting for the \$100,000 was, “I didn’t tell [Mr. Guerra] to keep the money himself. . . I believe that [the funds were] merely to be held pending close of escrow. I mean there’s no reason it shouldn’t have been accounted for by the close of escrow.” Id. at 106:5-9. Yet, Mr. Zlotoff, as counsel for Avon, did not feel that the issue was important enough for him to personally account for the funds or for him to comply strictly with the Court’s mandates. In fact, it was not until after the sale closed and Mr. Zlotoff received the closing statement and a check from the title company that he realized the sale was short by \$118,000. It was only then that he contacted Mr. Guerra to obtain those funds. And it was only by pure luck that Mr. Guerra (through Curtis Guerra and Mr. McClenehan) was able to come up with the

1 missing funds.

2 Mr. Zlotoff's dismissive attitude toward the Court's directives, failure to comply with the
3 Court's Order, and lax handling of this case allowed Mr. Guerra to abuse the sale process and the
4 bankruptcy system, and led directly to the OSC and all of the time and expense attendant to it.
5 Thus, for the foregoing reasons, and pursuant to its inherent powers, the Court intends to levy a
6 sanction against Mr. Zlotoff in the form of disgorgement of the entire \$3,520 that he has been
7 paid in this case, as compensation to the estate for the attorney fees incurred by Trustee's
8 counsel in investigating and uncovering the bad faith conduct that resulted, in part, from Mr.
9 Zlotoff's lax handling of this case. The \$3,520 in disgorged fees will be applied to the fees and
10 expenses awarded to Trustee's counsel, following an application and hearing for reasonableness
11 under 11 U.S.C. § 330 and will correspondingly reduce the amount of the joint and several
12 liability of Mr. Guerra, Mr. Lujano, Mr. Jaramillo and Mr. Goldstein (to the extent that Mr.
13 Goldstein's liability is finally determined).

14 **6. James McClenehhan**

15 The Court has found no evidence that Mr. McClenehhan made any direct and knowing
16 misrepresentations to the Court regarding the sale, or caused to be filed with the Court any
17 papers that contained knowing misrepresentations. Further, even though Mr. McClenehhan
18 testified that he knew that Debtor was in bankruptcy when the Property was being sold and it
19 was apparent to the Court that Mr. McClenehhan was knowingly attempting to hide the true
20 source of the funds used for the non-refundable deposits and, the Court has uncovered no
21 evidence that Mr. McClenehhan ever was informed of, or knew of the requirement that any
22 bankruptcy sale was required to be an arms length transaction, or knew of the significance of his
23 actions. Further, he did not attend the Sale Hearing, thus he was not privy to the discussions that
24 occurred on the record, nor is there any evidence that he was informed of the Court's concerns
25 regarding a potential connection between Metricz and Debtor.

26 Having said that, Mr. McClenehhan was unnecessarily evasive in some of his answers,
27 especially in response to questions regarding the source of the two deposits. His evasiveness
28 added to the time and expense of this proceeding. Balancing out his evasiveness, however, is the

fact that he was one of the only participants to this hearing that produced documents in response to the Court's inquiries and testified numerous times in response to other parties' testimony. Given that Mr. McClehan was one of the only semi-willing participants to this proceeding, the Court finds that sanctions under the Court's inherent powers are inappropriate.

The problem, however, is that Eagle Home Loans received a sales commission as the broker for the seller; i.e., Avon.

Section 327 of the Bankruptcy Code provides, in pertinent part, that a trustee, "with the court's approval, may employ one or more . . . professional persons. . . to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. § 327(a). Section 327 applies to debtors in possession by virtue of § 1107(a).⁹²

A real estate broker is a "professional person" as contemplated by § 327. In re Silver Oak Homes, Ltd., 167 B.R. 389, 398 (Bankr. D.Md. 1994); In re McConnell, 82 B.R. 43, 44 (Bankr. S.D. Tex. 1987); In re Eastern Inns of New Hampshire, Inc., 72 B.R. 418, 420 (Bankr. D. Me. 1987); In re Roberts, 58 B.R. 65, 67 (Bankr. D.N.J. 1986). A real estate broker is not entitled to a commission on the sale of estate property where his employment was not approved by the Bankruptcy Court. In re Haley, 950 F.2d 588, 590 (9th Cir. 1991); Enea v. Coldwell Banker/Del Monte Realty, 225 B.R. 715, 719 (N.D. Cal. 1998).

The Court finds that Eagle Home Loans was clearly acting as the broker on behalf of the Debtor. It was Mr. Guerra who approached Mr. McClehan about finding a buyer.⁹³ Mr. McClehan allegedly mentioned the Property to people with whom he came into contact. It was one of Mr. McClehan's contacts that allegedly found Mr. Lujano. Mr. Lujano claimed

⁹²Section 1107(a) provides, in pertinent part,

Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights. . . and powers, and shall perform all the functions and duties. . . of a trustee serving in a case under this chapter.

11 U.S.C. § 1107(a).

⁹³This, at least, was the story advanced by the parties, even though it was clear to the Court that Mr. Guerra had pre-arranged to have Metricz and/or Mr. Lujano purchase the Property.

that it was Mr. Jaramillo, not Mr. McClehan, that represented Mr. Lujano in the sale transaction and appeared to be unaware of Mr. McClehan's actions, or the fact that they were allegedly

performed on Mr. Lujano's behalf.⁹⁴ Mr. McClehan testified that he took instruction from Mr. Zlotoff (Debtor's counsel) regarding the deposits required for the sale. Mr. McClehan's actions were consistent with the Seller Estimated Closing Statement, which indicated that Eagle Home Loans was paid the commission as the "Listing Broker," and were also consistent with his receipt and retention of the commission on behalf of Avon.⁹⁵

Mr. McClehan claimed that he intended to refer the commission to Mr. Hernandez. The Court is not persuaded. Mr. McClehan testified that he never actually gave Mr. Hernandez the commission check. Mr. Hernandez's declaration, which was obtained by Mr. McClehan, never mentioned a request that the commission be paid to him or to anyone on his

⁹⁴Mr. Tate: "Sir, after you decided to purchase the property . . . then you hired Mr. McClehan as your real estate agent, correct?"

Mr. Lujano: "Is that the agent who does the loan for you, or what?"

Mr. Tate: "Well, there is a difference. Let me clarify it for you. As for the transaction of purchasing the property, **did Mr. McClehan represent you on the purchase of the property itself?**"

Mr. Lujano: "No. It was Mr. Jaramillo."

Mr. Edgano. **No. It was Mr. Jarainho.**
Mr. Tate: "Do you know that Mr. McClenehahn earned an \$18,000 sales commission as your real estate agent?"

Mr. Lujano: "I don't understand that. Could you repeat it, please?"

Mr. Tate: "Sure. Y

Mr. Tate: "Sir, You've purchased property before."
Mr. Lujano: "Yes."
Mr. Tate: "And you have purchased property with real estate agents representing the seller and buyer, correct?"

Mr. Lujano: "Yes."

Mr. Tate: "And you understand that real estate agents, whether they be for the buyer or the seller, oftentimes receive a percentage of the sales price as a commission? That's how they earn their money?"

Mr. Lujano: "Yeah, I guess so."

Mr. Tate: "Did you know that Mr. McClehan was earning an \$18,000 commission as your agent for the purchase of the [Property]?"

[Mr. Goldstein's objection is overruled by the Court.]

Mr. Lujano: "Well, you're telling me that when somebody acts as an agent that's the way they get paid. And so in this case **if he acted on my behalf, I guess he got paid that way.**"

See 9/10/08 Transcript in Case No. 06-5127, Docket #145, at 39:18-41:1 (emphasis added).

⁹⁵The Court acknowledges that Mr. McClenehan did not do many of the things that a professional would be required or expected to do on behalf of a bankruptcy estate (i.e., find out critical details regarding the Property, market the Property, list it on the MLS, etc.) Just because he did not do his job well does not mean, however, that he was not acting on behalf of the estate. The Court finds that the totality of the circumstances reveal that he was, in fact, acting as the estate's broker.

1 behalf, nor did it mention actual receipt of the commission. More persuasive, however, is the fact
2 that Mr. McClehan never actually referred the commission to anyone. Mr. McClehan
3 remained in possession of the commission until well after the close of escrow. It was not until
4 Mr. Zlotoff required Mr. Guerra to turn over the escrow shortfall that Mr. McClehan parted
5 with the funds. Mr. McClehan argued that his payment of the commission to Mr. Zlotoff was,
6 in fact, a referral fee, and that the Court would have to trace it from Mr. Zlotoff's account to see
7 where it went. That argument is disingenuous and misses the point. That Mr. McClehan
8 ultimately decided to funnel those funds back into the purchase of the Property does not negate
9 the reality that the funds were paid to Eagle Home Loans, kept by Mr. McClehan, and Mr.
10 McClehan ultimately decided where they went. The Court also notes that while Mr.
11 McClehan ultimately used \$18,000 of the commission for the purchase of the Property, there
12 is no evidence that he ever parted with the remaining \$300 of the commission. The fact that he
13 was able to determine how much to part with and how much to keep, supports the Court's
14 conclusion that Eagle Home Loans received the commission as Avon's agent.

15 Neither Eagle Home Loans nor Mr. McClehan were ever employed by the Bankruptcy
16 Estate, and Eagle Home Loans' receipt of a commission on behalf of the estate was improper.
17 Thus, for the foregoing reasons, the Court tentatively finds that Eagle Home Loans improperly
18 received the \$18,300 commission and that those funds should be disgorged to the Bankruptcy
19 Estate. Given, however, that the OSC warned Mr. McClehan only of the possibility of
20 sanctions under the Court's inherent powers, and not under 11 U.S.C. § 327 or its related case
21 law, due process requires the Court to give Mr. McClehan and Eagle Home Loans an
22 opportunity to respond. As a result, Mr. McClehan and Eagle Home Loans shall have 30 days
23 to respond in writing to this Memorandum and the proposed disgorgement. The Court will take
24 the matter under submission and issue a final decision following the 30 days.

25 **IV. CONCLUSION**

26 The tales woven by Mr. Guerra, Mr. McClehan, Mr. Lujano, Mr. Jaramillo and Mr.
27 Goldstein were complicated, inconsistent, and in many respects, unbelievable. The one common
28 thread, however, was Mr. Guerra, as all of these parties and their actions lead back to him.

1 While Mr. Guerra clearly controlled Metricz and orchestrated the sale and purchase of the
2 Property, he had a lot of help from Mr. Lujano, Mr. McClenehan, Mr. Jaramillo, and Mr.
3 Goldstein, all of whom actively and continuously attempted to conceal the true facts surrounding
4 the sale from this Court. Mr. Guerra's control over Metricz and all aspects of the sale and
5 purchase of the Property was also unknowingly aided by Mr. Zlotoff, who appears to have set
6 aside his professional judgment and abdicated his fiduciary duties to the estate and as an officer
7 of the Court. The end result was a grave harm to the Bankruptcy Estate by virtue of the fact that
8 the Trustee and his counsel were required to spend large amounts of time and money in
9 attempting to figure out exactly what happened. Perhaps the bigger concern, however, was the
10 violence committed by the parties against the integrity of the bankruptcy system. For these and
11 the following reasons, the Court intends to utilize its inherent powers to sanction the parties and
12 to compensate the estate for the losses it has suffered as a direct result of the parties' obstructive
13 actions. Specifically,

14 1/ Sanctions will be levied against Mr. Guerra, Mr. Lujano and Mr. Jaramillo, under
15 the Court's inherent powers, to compensate the estate for the expenses incurred in investigating
16 and uncovering their bad faith conduct. Mr. Guerra, Mr. Lujano and Mr. Jaramillo shall all be
17 jointly and severally liable for the fees and expenses incurred by Trustee's counsel in
18 investigating their conduct, bringing it to the Court's attention, and participating in the OSC.
19 The exact amount of the judgment shall be determined following the submission of a fee
20 application by Trustee's counsel and a hearing by the Court for reasonableness pursuant to 11
21 U.S.C. § 330;

22 2/ Sanctions will be tentatively levied against Mr. Goldstein to compensate the
23 estate for the expenses incurred in investigating and uncovering his bad faith conduct. The Court
24 also tentatively intends to hold Mr. Goldstein jointly and severally liable, along with Mr. Guerra,
25 Mr. Lujano and Mr. Jaramillo for the fees and expenses incurred by Trustee's counsel in
26 investigating their conduct, bringing it to the Court's attention, and participating in the OSC. To
27 the extent that sanctions are finally levied, the exact amount of any judgment will be determined
28 following the submission of a fee application by Trustee's counsel and a hearing by the Court for

1 reasonableness pursuant to 11 U.S.C. § 330. Mr. Goldstein shall have 30 days to respond in
2 writing to this Memorandum and the proposed sanctions. The Court will take the matter under
3 submission and issue a final decision following the expiration of the 30 days; and

4 3/ A sanction in the form of disgorgement of the entire amount of the \$3,520 in fees
5 that Mr. Zlotoff was paid for this case will be levied against Mr. Zlotoff, as compensation to the
6 estate for the attorney fees incurred by Trustee's counsel in investigating and uncovering the bad
7 faith conduct that resulted, in part, from Mr. Zlotoff's lax handling of this case. The \$3,520 in
8 disgorged fees will be applied to the fees and expenses awarded to Trustee's counsel, following
9 an application and hearing for reasonableness under 11 U.S.C. § 330, and will correspondingly
10 reduce the amount of the joint and several liability of Mr. Guerra, Mr. Lujano, Mr. Jaramillo and
11 Mr. Goldstein (to the extent Mr. Goldstein's liability is finally determined).

12 In addition to the above, pursuant to 11 U.S.C. § 327, the Court tentatively finds that
13 Eagle Home Loans improperly received the \$18,300 commission and that those funds should be
14 disgorged to the Bankruptcy Estate. Eagle Home Loans and Mr. McClenehan shall have 30 days
15 to respond in writing to this Memorandum and the proposed disgorgement. The Court will take
16 the matter under submission and issue a final decision and order after expiration of the 30 days.

17 An appropriate Order shall issue.

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